160 US 187

TRANSCRIPT OF RECORD.

160-187

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 953. 547

A. W. BALLEW, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED MARCH 6, 1895.

(15,817.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

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A. W. BALLEW, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

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1 *Indictment.*

UNITED STATES OF AMERICA, }
Northern District of Georgia. }

United States Circuit Court, October Term, 1893.

W-, the grand jurors of the United States, chosen, selected, and sworn in and for the northern district of Georgia, upon our oaths do find and present that one A. W. Ballew, whose further given name is to the jurors unknown, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the 5th day of September, in the year of our Lord one thousand eight hundred and ninety-two, did then and there unlawfully, wrongfully, and feloniously withhold from and refuse to pay to one Lucy Burrell, then and there a pensioner of the said United States, the sum of one thousand eight hundred and eighty-seven dollars and thirty-four cents, for that, on the day and year last aforesaid, the said A. W. Ballew then and there acting and having acted as agent of and attorney for the said pensioner and having been and then and there being instrumental in prosecuting a certain claim for pension of the said Lucy Burrell against the United States of America, alleged to be due and payable to the said Lucy Burrell, in accordance with the law in such case made and provided, as the alleged widow of Michael Burrell, late private, Company "K," 44th regiment, U. S. C. T., in the war of 1861 for the suppression of the rebellion, to whom pension certificate No. 338,769 was issued on the 23rd day of July, 1892, in conformity with the law, and whose name was inscribed on the pension-
2 roll of the *the* Knoxville agency at the rate of eight dollars per month from the 19th of November, 1864, and two dollars per month additional from the 25th of July, 1866, for each of her minor children, and twelve dollars per month from the 19th of March, 1866, upon which Treasury draft No. 347,367 was drawn in favor of and payable to the order of Lucy Burrell for the sum of three thousand seven hundred and seventy-four dollars and thirty-four cents; which said draft was drawn for the sum aforesaid and issued on the 2d day of September, 1892; which said draft then and there coming into the possession of the said A. W. Ballew without authority from the pensioner, Lucy Burrell, who did not get or see the check or know of the allowance of said check or of its having come into the possession of the said A. W. Ballew without the consent of the said Lucy Burrell and against her authority and direction until she was brought to the Merchants' National bank, in Rome, Georgia, on the 5th day of September, 1892, when the money on said check was counted out to her and placed in her hat upon the presentation of the check, the said Lucy Burrell was persuaded to leave said money in the bank and receive a deposit slip, the said Lucy Burrell being then and there an ignorant negro woman, who could neither read nor write, the said A. W.

Bellew took her immediately to his office and drew a check payable to the order of his son, Hurley Ballew, to which the pensioner put her mark, upon the presumption and under the idea, as she was informed, that it was for twenty-five dollars payable to her son, Charley Burrell, to enable him to visit his sick sister in Chattanooga,
3 when in truth and in fact the said A. W. Ballew, for the purpose of withholding from her and defrauding her of her pension money, had drawn the aforesaid check for eighteen hundred and eighty-seven dollars and thirty-four cents, payable to his son, Hurley Ballew, and the said A. W. Ballew got his son to endorse said check, and he, the said A. W. Ballew, received the money thereon and wrongfully and fraudulently did then and there convert the said eighteen hundred and eighty-seven dollars and thirty-four cents to his own use, and, being so fraudulently and unlawfully converted, the said A. W. Ballew did then and there unlawfully and wrongfully withhold and refuse to pay and continues to withhold from and refuse to pay to the said Lucy Burrell, pensioner as aforesaid, the said sum of eighteen hundred and eighty-seven dollars and thirty-four cents pension money—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second Count.

The grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further find and present that A. W. Ballew, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the 6th day of September, 1892, unlawfully, wrongfully, and feloniously — demand, receive, and retain a greater compensation for his services and instrumentality in prosecuting a claim for pension than is provided in the title pertaining to pensions, for that, on the day and year last aforesaid, the said
4 A. W. Ballew then and there acting and having acted as agent of and for one Lucy Burrell, a pensioner of the United States, and having been and then and there being instrumental in prosecuting a certain claim of the said Lucy Burrell against the United States of America, alleged to be due and payable to the said Lucy Burrell, in accordance with law in such case made and provided, as the alleged widow of Michael Burrell, late private, Company "K," 11th regiment, U. S. C. T., in the war of 1861 for the suppression of the rebellion, the said A. W. Ballew, as agent or attorney for the said Lucy Burrell, was instrumental in prosecuting said claim, and charges, demanded, received, and retained for said service the sum of seventy-four dollars—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

A true bill, 3 Nov., 1893.

EDWARD W. BROOKS, *Foreman.*

J. S. JAMES,
U. S. Attorney.

Filed in clerk's office Nov. 3rd, 1893.

O. C. FULLER,
Clerk U. S. C.

5 *Plea.*

The defendant, A. W. Ballew, being formally arraigned, waives copy of bill of indictment and list of witnesses sworn before the grand jury, and pleads not guilty.

In open court, this 22d day of October, 1894.

GLENN & MADDOX,
S. A. DARNELL,
J. C. FAIN,
Defendant's Attorneys.

Verdict.

We, the jury, find the defendant guilty.

This twenty-fourth day of October, 1894.

PAUL E. MORTIMER, *Foreman.*

6 In the Circuit Court of the United States for the Northern District of Georgia.

UNITED STATES *vs.* A. W. BALLEW, of Floyd County, Georgia.	True Bill. Indictment, Filed November 3d, 1893: Violation of Section- 5485, 4785, & 4786, Revised Statutes of the United States.

And it having been in due form determined and ascertained that there is no penitentiary within the northern district of Georgia suitable for the confinement of persons convicted of crimes in the courts of the United States in said northern district of Georgia, and the Attorney General of the United States having, in due form and by and with competent authority, designated the Ohio penitentiary, at Columbus, in the State of Ohio, as the place of confinement, subsistence, and employment of all persons convicted or who may be hereafter convicted of crimes against the United States of America in said northern district of Georgia, and such designation having been in due form notified to the court and entered upon the record thereof, and the court finding the same to be true—

It is considered, ordered, and adjudged by the court, by reason of the verdict herein, that the said A. W. Ballew be imprisoned in the Ohio penitentiary, at Columbus, in the State of Ohio, at hard labor for the term of two years, and that he pay the cost of prosecution, and that he remain imprisoned in said penitentiary until said fine and costs are paid or until he is otherwise discharged by law.

In open court, this 1st day of February, A. D. 1895.

WM. T. NEWMAN,
U. S. Judge.

[Endorsed:] No. 4115. United States circuit court, northern district of Georgia, Oct. term, 1894. United States *vs.* A. W. Ballew. Vio. secs. 5485, 4785, 4786, R. S. Sentence. Filed February 1, 1895. O. C. Fuller, clerk U. S. C. C., by J. D. Steward, deputy.

7 *Petition for Writ of Error.*

Circuit Court of the United States, Northern District of Georgia.

UNITED STATES
vs.
A. W. BALLEW. } Petition for Writ of Error.

Now comes A. W. Ballew, defendant in the above-stated case, and says that on the first day of Feb'y, 1895, this court entered judgment in favor of the plaintiff against this defendant, in which judgment and the proceedings had prior thereunder in this cause certain errors were committed to the injury of this defendant, all of which will more in detail appear from the assignment of errors filed with this petition.

Wherefore this defendant prays writ of error may issue in this behalf from the Supreme Court of the United States to this court for the correction of errors so complained of, and that transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

Feb'y 12, 1895. In open court.

GLENN & MADDOX,
Attorneys for Defendant.

8 *Order Allowing Writ of Error.*

Circuit Court of the United States, Northern District of Georgia.

UNITED STATES
vs.
A. W. BALLEW.

This twelfth day of February, 1895, came defendant, by his attorneys, and file- herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, and presenting herewith an assignment of errors alleged to have been committed, and praying that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration wh-reof the court does allow the writ of error upon the defendant giving bond, according to law, in the sum of two hundred and fifty ($250) dollars, which shall operate as a supersedeas bond.

In open court.

WM. T. NEWMAN,
U. S. Judge.

9 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The United States of America and A. W. Ballew, a manifest error hath happened, to the great damage of the said A. W. Ballew, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 12th day of Februa-y, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal U. S. Circuit Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the Circuit Court of the United States
for the Northern District of Ga.

Allowed by—
WM. T. NEWMAN,
U. S. Judge.

10 *Supersedeas.*

Circuit Court U. S., Northern Dist. of Georgia.

UNITED STATES
vs.
A. W. BALLEW.

Def't in above-stated case having applied for and obtained a writ of error to the Supreme Court of the United States, and having filed the order allowing same in clerk's office, and being now on bond to appear and abide the final order and judgment of this court—

It is thereupon ordered that the sentence in said case be superseded until after the same be passed upon by said Supreme Court on the writ of error.

In open court, Feb'y 12, 1895.

WM. T. NEWMAN,
U. S. Judge.

11 *Bill of Exceptions.*

In the United States Circuit Court, Northern District of Georgia.

UNITED STATES }
vs.
A. W. BALLEW. }

Bill of exceptions in the circuit court of the United States for the northern district of Georgia.

Be it remembered that at the October term of the circuit court of the United States for the northern district of Georgia, in the year of 1894, the Honorable William T. Newman presiding, there came on for trial the case of The United States of America *vs.* A. W. Ballew, being then and there an indictment for the violation of the pension laws. A jury being regularly empanneled, the following evidence was introduced and exceptions taken:

Counsel for the United States tendered in evidence the following transcript from the Department of the Interior:

12 UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR, PENSION OFFICE,
WASHINGTON, D. C., *March* 27, 1894.

I hereby certify that the accompanying page, numbered 1, is truly copied from the original in the office of the Commissioner of Pensions.

WM. LOCHREN,
Commissioner of Pensions.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 28, 1894.

Be it remembered that William Lochren, who has signed the foregoing certificate, was at the date of signing thereof Commissioner of Pensions, and that to his attestations as such full faith and credit are and ought to be given.

In testimony whereof I have hereunto subscribed my [SEAL.] name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

JNO. M. REYNOLDS,
Acting Secretary of the Interior.

EXHIBIT 1, M. J. M. SIEONG.

13

Certificate Record, Widows, etc.

Notes.	Certificate number.	Name of soldier	Rank.	Organization.			Relationship.	Name of pensioner.	Agency.	Date of issue and mailing.			R.	Original.						Increase.						Names of minors.	Increase.					
				Co.	Reg't.	State, &c.								Commence't.			Ending.			Commence't.			Ending.				Commence't.			Ending.		
										Y.	M.	D.		Y.	M.	D.	Y.	M.	D.	Y.	M	D.	Y.	M.	D.		Y.	M	D.	Y.	M.	D.
	338,769	Michael Burrell.	Pvt.	K	44	U. S. col'd vol inf.	Wid.	Lucy	Knoxville	'92	7	23	'88	'64	11	10									Charles Q	'66	7	25	'70	5	4
										"	8	4	12	'86	3	19									Kitty	'68	2	3	'73	10	12
																										Clarissa	'70	8	11	'77	7	18
																										Lucy	'72	5	5	'79	3	16

(Certificate division, J. McS. L.)

DEPARTMENT OF THE INTERIOR, BUREAU OF PENSIONS,
WASHINGTON, D. C., *March* 27, 1894.

I hereby certify that the above is a correct transcript from the records of this bureau.

WM. LOCHREN,
Commissioner of Pensions.

Page 1.

14 Mr. Glenn, of counsel for the defendant, objected to the above transcript, first, because not properly authenticated as coming from the department as required by the statute; second, that it is not a transcript of any record or document on file in the office of the Secretary of the Interior. The objection was then and there overruled, and an exception was then and there taken and duly noted by the court.

Counsel for the United States then tendered in evidence transcript of record from the War Department, which was admitted without objection.

Counsel for the Government then tendered in evidence pension check No. 347,367, to Lucy Burrell, which was admitted.

15 J. KING sworn for the United States.

Direct examination by Mr. RUCKER:

Q. (Hands witness batch of papers.)

I am president of the Merchants' National Bank of Rome and was in Sept., 1892; know Lucy Burrell; know A. W. Ballew; know Hurley Ballew; know J. B. Chamblee; know H. J. Johnson; he used to be ordinary of Floyd county. Mr. Ballew came into the bank on the latter part of the week, on Friday or Saturday, and notified me that he wanted to get me to cash a check for him; that was A. W. Ballew. I never had any transaction with the other one at all. I told him all right, and was preparing to wait on him when he said, No, he was on his way to Atlanta and he would see me the first of the week. The next thing I knew he came in the banking office on Tuesday morning and with him was this woman, Lucy Burrell. I think his son was with him and Lucy Burrell's son Charley also. They came to my private office, and Mr. Ballew told me that he wanted to get me now to cash this check for the old woman, and I told him, All right. He handed me the check and I looked at it and saw it was all right and properly endorsed. I also took it out to Mr. McGruder, our cashier, because he was more familiar with the proper endorsement. He said it was all right, and I told him to give me the money on it, and he gave me the money, and I took it back and gave it to this woman. That was the money on that pension check, signed by Mr. Rule. The amount was $3,774.34. The check was payable to Lucy Burrell. It was just an ordinary business transaction, and I paid her the money. I think I asked the old woman if she wanted to take the money home with her or leave it in the bank. She said she wanted to leave it in the bank. Probably some other question was propounded to her by myself or Mr. Ballew. She said she wanted to leave it in the bank, and I went out and told Mr. McGruder to wait on her and he then gave her a deposit slip. Probably Mr. Ballew told her it was safer and better. That is my best

16 recollection.

After this money was deposited in the bank—in less than an hour, possibly—this check was presented for $1,887.34. This was the 5th day of Sept., 1892. I am not sure whether it was Monday

or Tuesday. I know it was the early part of the week, and I know this check was presented *to* same day the other one was paid. This check bears date September 6th, and was presented the next day. That check is for $74.00. Two days after that two checks were presented, one for $575.00 and one for $600.00; they were paid; I was in the rear of the bank—that is, in the rear of the bank-room, about 40 or 50 feet from the front; that is my private office. They came into our private office and delivered me a check. The check delivered to me I took out to Mr. McGruder, the cashier. Upon his information of its being properly endorsed I had it cashed. I gave it to this old negro woman. She took possession of it, and I remember she pulled off her hat and I gave her $3,700.00 of currency and some silver, and the old negro remarked that she had never so much silver before in her life. Mr. Ballew was in the office. I think I suggested to her that she had better deposit the money. That is what I usually do in those kind of cases. There was nothing wrong in the president of the bank soliciting deposits; that is my business. I suggested that it would be better to leave the money in the bank. She was willing, and I think she intended to do it from her remarks to me. If Mr. Ballew said anything at that juncture it made no impression on me except in a casual way. My best recollection is, her intention to deposit the money was manifested by what I and she said. She took the money and delivered it to the cashier—she did herself. I just walked out when she stated to me that she wanted to leave it in the bank and told Mr. McGruder that she wanted to make a deposit, and to give her the proper certificate, and Mr. Ballew was walking along there with us.

17 He was exercising no control or direct over the money; none at all. In fact, it was a business transaction on my part. I will state this, also: That Mr. Ballew had frequently brought checks there. We cashed all his checks for him, usually. We have cashed a great many of those pension checks. They sometimes leave the money on deposit. I remember in a week after this I cashed an $1,800.00 check and the party took it all out. He lived in Walker county.

My recollection is that I walked out and told the cashier what was to be done and then returned to my office, and I don't think I witnessed anything more that occurred after that. This $1,800.00 check was presented within an hour after that. Mr. A. W. Ballew had nothing to do with the drawing of that money; not a thing. If it had been paid to him the bank would have required the proper signature and proper endorsement. The endorsement there is Hurley Ballew, because the check is made payable to Hurley Ballew. That handwriting, the endorsement, is not by A. W. Ballew. The check is witnessed by J. B. Chamblee. J. B. Chamblee has a saloon in Rome, at the Dental hotel. He is a very good citizen. Johnson, whose name appears as a witness, witnessed that check before it was brought to the Merchants' National bank; that is my recollection. He was the ordinary of Floyd county. No man stood higher in Floyd county. He has been ordinary there for 15 years or more. He is dead now. I have known Mr. A. W. Ballew, I think,

5 or 6 years, possibly a little longer. I have never known him except since he moved to Rome. I had a slight acquaintance with Mr. Ballew. I never had much business with him. He is a very quiet, good citizen, so far as I know. That is the only charge I have known against him.

This $74.00 check was paid the next day. It — stamped on the 6th. That is endorsed by A. W. Ballew himself. That is his signature. The signature on the back of this check is H. J. John-
18 son's. I noticed it. I know that to be his signature. The signature of Mr. Chamblee, I know that that is his genuine signature. We paid a great many checks signed by those signatures. As I remarked awhile ago, that is the only charge I have ever heard against Mr. Ballew. I believe I recollect hearing of Mr. Ballew being connected with other things. I think the information I got came through Mr. Fitzpatrick. I really don't remember how many. Possibly I have heard it talked in Rome, independent of any officers of the Government. We have men in our community who stand better than Mr. Ballew, and some worse. I am free to say that while I have heard Mr. Ballew criticised some and some reflections made upon him, still I think his general standing there is very fair. Whenever Mr. Fitzpatrick has been there I have heard talk about pension swindler. Have known Mr. Fitzpatrick since this case began to be investigated. I don't know as a fact whether or not he was connected with the Pension Department prior to the incoming of the present administration.

J. F. FITZPATRICK sworn for the United States:

The position I held with the Government in Sept., 1892, was special examiner of pensions. I hold that position now. The duty involved upon me by virtue of the office is to investigate such claims as are sent to us criminally and the merit of such claims. In Sept., 1893, I first took some testimony in this particular case. He came to the office where I was taking the testimony and asked some question that I declined to have anything to do with it. It was a criminal matter and I didn't care to talk to him about it. After dinner that day he followed me upon the street and came to me and we had some conversation about it. This other case was pending at the time, and he said he was going to let that go by and he wanted this thing dropped, so he would not be disbarred from *pa*cticing in the Pension Department. I told him he had better see his attorneys, and he said they didn't know anything
19 about United States laws and he was going to Atlanta to get somebody. I asked him what about his son in this matter, and he said his son didn't have anything to do with it; that he got this money, this $1,887.00. Had seen this Rule check at that time. I had the papers in my office. That was the subject-matter of the investigation. That check there is for $1,887.34, and this one is for $74.00. These three papers I had in possession and had under ad*ver*tisement before I had this conversation with A. W. Ballew. This was in Sept., 1892. In this conversation with Mr. Ballew that

$1,800.00 check—he claimed that it came out of the original paper and that it was an illegal fee; that is what we call them. He was an attorney in the case and he had gotten more than his allowance. On A. W. Ballew, at the time I had this conversation, I was charging this $1,800.00 check and this $74.00 check. I received these checks in June, and my recollection is that the papers were sent back to me, and I went down and completed the case in Sept. I charged that he had gotten this money in the way of an illegal fee out of the allowance of Lucy Burrell. I understood that he was talking about this matter when he was talking to me. He said he could dispose of the other charges if he could get this one out of the way. I know this is the one he referred to. He approached me that forenoon and asked me if the papers had been sent me by the department or if I was doing it on my own authority. He said he got it himself; that his son was not in it. He said that he was the beneficiary; that his son was about to get married and he didn't want to get him into any trouble, and acknowledged the whole thing. I have enquired a good deal about the general character of Mr. Ballew in Rome, and his character in that community is bad; have had no other conversation other than that one with Mr. Ballew; have stated all I know concerning his connection with it. I don't think I had any conversation with him about taking the letter from the box. While in Rome, investigating this case, Mr. Ballew came to me about it and tried to get me to drop it. That is about the purport of it. In the course of the conversation he said that — son was either married or about to get married and he didn't want him to get into any trouble, and that he would take the whole burden of the thing. He said he was beneficiary and got the money. He never asked me to recommend his reinstatement in the Pension Department as attorney. He said he could settle all other matter without any difficulty, but he hadn't asked me to do it. As to insisting that the case ought to be dropped, you can draw your own conclusion from my statement. To the conclusion that he was making the confession, I don't know that I am obliged to give any opinion about it. That I understand it now or then to have been a confession of guilt, I did not say so. I commenced as special examiner about 10 years ago; have never been suspended—yes; I was suspended soon after the incoming of the present administration for two or three days, but never was out of the service. I was given notice that my time would expire at a certain time, and before it did expire the order was revoked; have got a good deal of feelings in this matter; no more than the others. I am usually very vigorous to the best of my ability. It is a fact that I have been so about this case, just as much as usual. In Rome I have enquired about his reputation and character; have discussed this matter a good deal with those I talked to. I think it is a necessary part of our investigation to tell people the information about this case. I do not think it ordinary discretion to go around and try to make up the character of a man. I was trying to ascertain it. I had to report his character to the bureau when I sent in my report. My purpose in enquiring about his character was to make

a report to the Government. I am obliged to do it. He stated to me that he got the proceeds of that money.

21 WILLIAM RULE sworn for the United States:

My position in 1892 was United States pension agent at Knoxville, Tenn. I identify that check. It was payable to Lucy Burrell in payment of a pension due her. These are vouchers upon which this check was based. The check was for the amount due, less $25.00 for her attorney; was to A. W. Ballew. I sent that check to A. W. Ballew; sent the other one, the large one, to Lucy Burrell by mail, to box 74, Floyd county, Ga. There is a regulation of the Post Office Department which prohibits us from sending those checks to any one except the pensioners. I mean the Post Office Department. I sent her the allowance, less $25.00, to post-office box 74.

J. F. FITZPATRICK recalled:

In the conversation with A. W. Ballew as to this matter he said that any other case that he had he would endeavor to let the money get into the hands of the pensioners before he would take any part of it in order to avoid the statute. That conversation was in June, 1892, when I was investigating this claim on its merits. Possibly I may think of something else if you will let me come down and give me an opportunity.

LUCY BURRELL sworn for the United States:

My name is Lucy Burrell. My husband is Michael Burrell. My master's name was Burrell, and I went by his name. I am informed that my master is dead. I have not seen him since he was in the war. I ain't got but two children now. I had seven; been married twice. Michael is my second husband. He is the one I had last. I had seven children by him, and they are all dead but two. Their names are Charles, Quintard, and Clarisse. In 1892 I had a child living by the name of Kitty, but she is dead; died since
22 the war. I had one name- Lucy. I live in Rome. I have lived there ever since I came from North Carolina, when I was young. I know Mr. A. W. Ballew. I got him to get a pension for me. I was in Rome, and he was going through town getting things like that, and he asked me about it one day, and I told him as far as I knew anything about it, and then he took it in hand. I am not able to tell you what day my pension come, because I knew nothing about it until word came to me Saturday. He did not tell me, but sent me word on Saturday for me to come down soon Monday morning, and I went down — morning. I went to Mr. Ballew's office. He says to me, "Lucy, our money has come." I was sitting down there, and he got up then and went to the shelf and got it down and showed it to me. He says after awhile we go down to Mr. King's and get your money, and I told him all right; so after awhile he knocked about there in the room and then me and my son and he and his son, all four of us, went down there together. I

think that perhaps in his office he says to me, When you get this money you just return it back to him again. I thought he was doing right, and after he gave me the money I put it in my old hat and carried it around to the window and returned it back to him again. He told me to give it back to Mr. King and not to bring it out. He didn't tell me anything more; then follow me around to see where I put it. He told me one time not to bring it out, but just to return it to the bank again. When I got the money I went around to the window and emptied my old hat out on the place and emptied all out but ten cents, and he said, You haven't got it all; and I shuck my hat and this ten cents fell out, and I handed it to him. Then I left the bank. I cannot read or write. After I got through with the money I went back to Mr. Ballew's office and got him to write for this boy $20.00—that is, for Quintard. He sent for Mr.
23 Chamblee after I got up there. He was sitting down at the table, writing. I don't know whether he wrote it or whether Mr. Chamblee wrote it. I did tell Mr. Ballew what check to draw that first day after I went back to the bank—a check for Quintard, to give him $25.00. What he was going to do I don't know. He said to me, he says, "Mother, I want some money." After I drew that check I didn't do anything more than to sit there, and when Mr. Ballew wrote the check and called me to the table he says, "Aunt Lucy, you seem to be afraid to touch the pen;" and I says, "I have touched it so much and didn't know what I was doing that I am afraid to touch it." He says, "Go on and touch it." That is the money I told him to draw for Quintard. I went home and told Quintard; he was draying; he didn't stop at all; he just went on with his work; did not go back to the office again that day. I went back the next day and gave him an order for $25.00 for his trouble—for what he had been doing. That was on Tuesday. I think he sent for Mr. Chamblee; he was standing up in the floor, reading something. What it was I do not know. I told him I wanted him to draw a check for $25.00 to pay him. When I went down there the first morning Mr. Ballew said nothing about buying a house and lot as I remember. After that he said to me, "You have got no home. Don't you want me to get you a house and lot?" and I told him I reckon so, sir, and then after seeing my daughter she says, Don't you get any house and lot with Mr. Ballew. I did not have any conversation about what I was to pay him. In writing one day he says, "Now, Lucy, if I get this money, if it happens to turn out as we aim to do," he says, "what are you willing to give me?" and I says, "I don't know, Mr. Ballew. I don't know whether I am willing to give you anything or not;" and he says, "If you give a thousand dollars to me, just you carry it and put it in my wife's lap and make her a present of it, because they don't allow me to do such as that." He says, You make her a present of it. I didn't tell
him yes and I didn't tell him no; did not have any idea that
24 that check on that Monday was for $1,800.00; did not know that I was giving him or giving Hurley Ballew that much money; did not agree to give him any money; did not have any idea of the quantity until my daughter told me. Hurley did no

work for me except when his father first took up this pension business he went out in the country to see my white people, away back where I lived. He went with me to see if he could not get some information from my family folks. He went to my young mistress with me, who was living up there at one time. That is the only time he went with me. I can't tell you how old I am. When the war ended I had all the children that I did have; these children I am talking about. I did have 13 children. I did not have but four when the surrender came. My first husband, before I came to this country, belonged to Mr Terry, and I left him behind, and then I married this man, who is these children's father. I have never been married since then. When I lost him nearly all my children that I had by him were gone. The white folks I belonged to was named Burrell. They brought me from North Carolina; then went to live in Floyd county. There is where I married Michael Burrell. I have lived there ever since the war. My white folks are all dead in this country. My mistress had no children at all, and they are both dead. My oldest daughter died a long time ago. I had one named Lucy and one named Clarisse and one named Kitty and one named Fanny, and then there was an older one named Judy. Lucy didn't draw a pension awhile, or one of my daughters. She is dead long ago. I had a daughter named Judy Burrell, and after the war she left me. I can't tell you anything about it; don't know what become of her. I have not seen her since the war, when we all broke up and she left me, and I have not seen her since. Hurley Ballew carried me out there to get some recommendations from my old white folks, as I understand it, as to how many children there were and such as that, because he set by the fire-place where old mistress was living, and she told him, and he would write it down. I don't know anything about it more than he told me. I was not informed that it was necessary to get up the testimony on that point to show that I was the real widow of Michael Burrell. Hurley Ballew didn't have an arrangement by which he was to help all the way through getting up the testimony. I looked to the old man. He was my dependence, and I thought he was working for his father. That Hurley Ballew helped often about this matter I can't say, in the way of hunting up testimony. That was the time his father sent him over to my house once; was hunting up testimony to prove that Judy Burrell was my daughter and how many children there were. After all commenced until we got the pension I reckon it was about two years. I was not so busy myself, and I don't know what Mr. Ballew was doing. I was not in his office a great deal; had to sign a lot of papers at different times. Those papers would go off and more papers would come back. He would do the reading, and he would then call me to touch the pen. Then we would make some more papers. It kept on that way for two years, I reckon; it may have been more. I don't know; had a good deal of trouble getting it. I reckon he did. I don't know what trouble he had. I know they bothered me a heap about signing papers to get it on. On Saturday I got word that I was to come downtown soon Monday

morning, but what it was for I don't know. He did not send me word about the money. He sent me word to come downtown soon Monday morning; went downtown with my son, and he didn't go upstairs when I went up in his office. My son is named Charles Quintard. He is a right sensible fellow. He hasn't got much learning, and he don't know much. He can't read and write; if he can, I don't know it. I didn't know that the money had come at all. Quintard brought me word Saturday night that Mr. Ballew said to come downtown soon Monday morning, and I went. When I got downtown I went to his office. He got the check from among his papers, and he says, Our money has
26 come, and held it up that way (illustrating). That is all I know about it. He says, We will go down and get it after awhile. I reckon Mr. Ballew opened the letter the check come in. He took it out and showed it up in his hands. At the bank I did not stay any longer than he got ready to go down to the bank. I reckon Mr. Bellew got the letter out of the post office. I never seen a paper or anything until I got to his office. When I got there he held it up in his hands that way and showed it to me. The box at the post office had been dismissed me a long time before that. The box had been dismissed some time before that money came. I don't know whether I did any writing on that check or not; no more than touch the paper that he was writing off. That is the most writing I done until the money came; then I touched the pen for the scrip that he wrote. Mr. Chambless was there when I touched the pen for this check—the pension check; I remember that. I remember that picture on there (indicating picture on pension check); if that is — the one, it is one like it. If Mr. Chambless was there when I touched the pen, I don't recollect it. If I touched the pen on that check at all, I don't recollect it. I know he took up the paper this way and said, Lucy, our money has come; didn't touch any pen on that paper. Nobody wrote my name there; if they did, they wrote it after we went to the bank. I did not put my mark on this paper. If Mr. Chambless was there when that occurred before I went to the bank, and when he held it up and says, Lucy, our money has come, I don't recollect nothing about it. I can't say who was in the room. There were two or three men in the room, and I didn't know either of them. I know Mr. Johnson, the ordinary of Floyd county. Mr. Johnson was there. He signed one or two papers for me before. I did not do a thing there that morning. I did not touch the pen before — went to the bank. Mr. Ballew carried the check down there and gave it to Mr. King
27 himself. After he showed it to me he says, Lucy, our money has come, and we will go down and get it directly, and we went off and left the men in the office, and me and him and Quintard went to the bank; four of us went to the bank; me and my son and he and his son. I didn't know anything more until Mr. King got the money and gave it to me and I put it in my hat, and I gave it back to him then, and he sat down and wrote something and gave it to me. After Mr. King gave me this thing he was writing I gets up and goes round to the window and returned the money

back to the bank again. It was there at the bank Mr. Ballew told me to put it in the bank. I left it there. Mr. King didn't tell me anything about it. He did not said that I could leave it there and get it out as I wanted it. Mr. King didn't tell me anything. Nobody told me to put it in the bank except Mr. Ballew; I am certain of that. After I got through putting the money in the bank they gave me a slip of paper, and I carried that to my daughter. Mr. King gave me that and I took it home and gave it to my daughter. From the bank I went back to Mr. Ballew's office; Mr. Ballew and my son, all three of us, went back in his office. After we got to the office Hurley went off somewhere else—I don't know where—and Quintard went on to his work. When this check for $1,800.00 was written I don't know, because there are very few of the men in town that I know, any more than I do here. I don't know who was in there. I understood I was getting a check for $20.00. If I gave a check for any more than that, they tolled me into it. They took charge of my ignorance; I could not read, and they fooled me into it. That $20.00 check that I signed my name to was for Mr. Ballew for the trouble he had with me. I did not give a check but two times; the first one was for my son for $20.00, and the next one was for Mr. Ballew; that was on Tuesday. The $25.00 check on Tuesday was for Mr. Ballew, and the $20.00 check was for that boy
of mine; did not show what that check was for; if they did
28 they didn't show it to me. Mr. Ballew wrote the check that I gave to my son. Mr. A. W. Ballew wrote that check and wrote the check that I gave to my son. He did not tell me what the check was for that he wrote for my son; I thought it was for $20.00. I am certain they didn't tell me it was for $10.00. I am certain they didn't tell me it was for $25.00. As old as I am, I know a good many things, and I recollect that. They told me it was for $20.00; not $25.00 or $20.00 or anything else, but $20.00. Mr. Ballew, the old man, wrote that check. After he wrote it he told me what it was for, and told me to put my name to it, and, supposing it was all right, put my mark to it. I reckon I made my mark to a heap of things when I didn't know it. I don't know whether Mr. Chambless was there when that check was written or not. I believe he sent for Mr. Chamblee in the time that he was writing, but what he was writing I don't know. I know Mr. Chamblee, have known him since I saw him at his office, and saw him there. At the time this other check was written—I am talking now about the $20.00 check for my son—I don't think he was there. If he was there I did not see him. Mr. Ballew wrote the check for this boy to get the money. Mr. Chamblee was there soon afterwards, in the time that he was writing it. After that I went home; did not see Mr. Ballew any more until next morning. A daughter, Lucy, this Henrietta Haynes, was my first husband's child. She was related to the rest of these children except by me. She is dead. She died in Chattanooga. She died since this pension was allowed, because I know my son went up there. I asked him to go, and I went afterwards and carried some money. Henrietta Haynes was my
29 daughter who lived in Chattanooga. She died after this

pension money came to me. She was not dead when I got the money. My son went to see her the very day she died. She was dying when he got there. He had his money to go with. I did not give him any money, but he must have got it from Mr. Ballew. Henrietta Haynes' burial expenses was paid, I reckon, by her brother-in-law. I didn't pay some of them. Clarisse got some of this money. This $20.00 was for both of them, too. When Henrietta Haynes died, that is the time I am talking about. They did not get that but one time. I told Quinzard to go to Mr. Ballew and get so much money to his part, and after he got it he just harum-scarum. Quintard got his own. I told him he could have it, what went to him, and do as he chose with it, and he done it. I don't know anything about getting any money from Mr. Ballew until the pension money came. I went downtown to see Mr. Ballew and let him get his money, his $25.00 I allowed him. My daughter Clarisse was with me that day. Ballew never let me have $3.00 since I have been in this world. He did let me have $1.00 for riding back and forth on the street cars. It is not true that me and Mr. Ballew sat down and counted up all those things and they amounted to $49.00. I didn't say to Mr. Ballew I wanted $25.00 myself; you let me have $25.00 and we will put it all together and didn't make $74.00. By the Lord, it is not so. I did not say I did not want to go to the bank, that it would save me from going to the bank, and he let me have $25.00, and I told him, "Just put it in with this amount and I will give you a check for it. No, sir; I will stand on my life for what I done. I don't know how I give him a check for $74.00 that day if I only owed him $25.00. I don't know how he got it. I thought the check was for $25.00. I did not know it was for $74.00. Didn't with Mr. Ballew have a settlement that day, and it amounted to $49.00, which with the $25.00 I got *the* amounted to 74.00. No, sir; I have never known anything about that. I have been before the grand jury three times on this case. My health is not as good as it has been. I have been sick a good deal for the last year or two; have had a pretty rough time so far as sickness is concerned. To tell the truth, I don't know that I have had such a rough time. I have never been confined to my bed. I was much stronger and stouter a couple of years ago than I am now. I don't know that my mind was much better than now. I reckon my mind is nearly as good as it ever has been. I have got a right mind now. Didn't swear at that time that I had no arrangement or contract with Mr. Ballew to pay him anything outside of the legal fees. No, sir; I didn't have any understanding as to anything about the fees. A legal—I don't know what it was, but I just allowed Mr. Ballew $25.00; so when I paid him that $25.00 on that day after I got the money I did not have any understanding with him that he was to have anything except the $25.00. No, sir; I did not. I had no agreement for that at no time at all. At no time did I have a contract or did he ask me to promise to pay him anything but the legal fees. No, sir; I never did, because he came to my house once to know what was the matter with me, after this thing got out. He

says to me, "I thought you were satisfied about this matter; and if it is money you want, money you can get." This is the last
31 conference I have had with Mr. Ballew. I never said much then. I don't know whether it was spring or fall of the year I was down here. This is the third time I have been here. The grand-jury room, I don't know where it is. I just come and sat down awhile, and they turned me out. I went on about my business. I did not go in there, where there was a lot of gentlemen, and tell them about this thing. This is the only time I have ever been asked about this case. The other time I came in there and sat down, and when the courts broke up we went on about our business. About being before the grand jury of this court—no, sir; they never had me before it. The first time I came here I sat back yonder, and they didn't call me at all, and when court broke up me and my company went on out, and the next time court was put off. I am not mistaken. This is the first time I have been sworn in this matter in this place. Clarisse was not sworn here, either. Me and her came in here together. I have never been here before by myself. When we were here before there were but four of us in the party, and four of us set back yonder on those seats. Clarisse and Charles and Mr. Stinson all the time this thing has been going on had nothing to do with it. The folks were standing around back there, but we didn't know anything about it. The grand jury? No, sir; I don't know what that is. Have been here twice on this case, and both times Mr. Ballew put it off; I remember that. Mr. Ballew came to my house once. He was never there but once as I know, and that is the time he came out there to see what was the matter with me. I expect Fitzpatrick was after him then. He says, "Well, Lucy, I am very sorry about that money," and we
32 talked awhile, and he says, If you will come downtown we will settle up this business. I sent Mr. Stinson down there. He says, "What time are you coming?" and I says, "I reckon about 8 or 9 o'clock, if I feel well, I will come." So when the time come to go I got Mr. Stinson to go there and attend to it, and he said he never saw Mr. Ballew anywhere. Henrietta died a little before or about the time this pension money come. Mr. Ballew never let me have but one dollar that I know of since I have been in this world. He gave me that one day to keep me from walking backward and forwards from my house. On that I rode back and forth; did never authorize Mr. Ballew to let Clarrissa have any money; did never authorize him to let Quintard have any; did never authorize him to let anybody have any. No, sir; I never borrowed any money from him. I don't know whether he has a son in the post office or not. I don't know that Mr. Ballew's son clerks for Mr. Chamblee, either.

CLARRISSE BURRELL sworn for the United States:

Lucy Burrell is my mother, and we live in Rome. I know Mr. Ballew. The pension money came; mother's money, I mean. No, sir; don't know when it came. I know when she told me. When

I heard it had come I did not go down to Mr. Ballew's office. The first time I went to his office after the money come was on Wednesday after she had drawn the money. I went down to change the deposit to the First National bank from the Merchants' National bank. I wanted to change it because I did not know whether that was a safe bank or not. There was no checks drawn there
33 that day. No money passed hands. Did I talk to Mr. Ballew about changing deposits? Yes, sir. He said it was all right there. Nothing further happened on Wednesday. I went back again on Thursday. She had decided before she went back to find out what money she had and give her children a portion of it; that was myself and my brother. We are the only two Burrell children living. So when we went back Thursday she went to Mr. Ballew's office and told him that she wanted to give Brother Charles a part of it and myself, and he says, Well, Lucy, it will only be $600.00 each—that is, $600.00 for Clarisse and $600.00 for Quence and $600.00 for yourself. I says, How do you make it that way when our deposit slip calls for $3,700.00 and odd dollars? How is it that there is only $600.00 each? and he says, You don't understand it, but Lucy and Charles does. I says, "Mr. Ballew, if I don't understand it, I came down here to ask you to give me an understanding about it." He says, "Lucy and Charles understands it," and that is all the satisfaction he gave me about it on that day. Mother was present, sitting in the office. There were only two other gentlemen in there. My mother gave me the deposit slip given to her by the Merchants' National bank. I saw from that how much money she had on deposit. I can read and write. Henrietta died the 9th of September, 1892, after this pension money had come. Mr. A. W. Bellew or Hurley never let me have any money; never let me have any credit for goods at any store; paid no burial expenses or anything of that sort. I asked Mr. Bellew, the old man, if he let Quintard have any and he said no, and turned in and asked Quintard, and he
34 said he didn't. Myself and mother and her son were present. Mother and A. W. Ballew and his son and myself were present. When we went in old man Ballew was not in there, but he came in a few minutes afterwards, and he says, Well, Lucy, good morning; what is it this morning? And I told him then she was not satisfied yet about the balance of her money and I would like to understand something more about it, and then he sat down and gave me an understanding as far as he could understand about it. Now, Clarrisa, he says, are you not satisfied? I will just tell you what happened about the balance. He says, I had to go to Washington before the bill was put through for that money in order to get it, and there was myself and two other gentlemen. One of the gentlemen was in Washington, and I think he said he took the other one from Atlanta. He says, You know it took a great deal of expense to take me there, and he says he had to bring these other gentlemen to help him get the bill through Congress. He said this other money that he had not accounted for was spent in getting this bill through Congress. That was all. Then I left him there and went home. I think he said he carried one man from Atlanta

and the other one was in Washington; that the one in Washington was a member of the House. He said he was in a house of a friend of his and that he spent this money and did not pay my mother to get the bill through Congress; don't know whether Mr. Ballew had sent in the papers or not; don't know anything about that. When mother got this money I was living in Rome, but not exactly in the corporation of the city. We had been living at that
35 place nearly three years; living with a Mr. Rush. I had not lived with my mother for quite awhile before that. After she got her money I went to live with her. It is not a fact that I had not paid any attention to my mother before that. Yes, I know a gentleman by the name of Stinson. When he works he lays rocks. Stinson lives about a mile. He is a married man; has a family. I know him pretty well; did visit his house. He has visited our house. I got that money on the 8th of Sept. I don't know when Charles got his. I gave him the check on the 9th. I don't know when he got it. I knew the amount then and took the $600.00. Charles took $600.00 and that left $600.00 for mother. She has got it. I have seen that paper before. Clarisse Burrell's name is on the back of it. Clarisse Burrell went to the bank with that paper. The money was paid to Clarissa Burrell; never swore I went there and changed that deposit on the 8th of Sept. I did not say that I had that conversation with him while there. This check is not right. This is not the check for my money. This check is for mother's money. Mr. King took his deposit slip back when he drew off that check. To show when I changed the deposit I have got my check here on the First National bank. I wanted to put it in there because I had had money in the First National bank before, and I found it to be kept safe, and I never had been dealing with Mr. King's bank. I did know that the Merchants' bank was a national bank. I knew it had not been there as long as the First National bank. To get not only my $600.00, but the old lady's $600.00 too, I was not driving at.
36 I took $600.00, Charles took his, and I drew mother's $600.00. I knew the amount each of them were getting. When mother gave this check for $600.00 I drew it out of Mr. King's bank and put it in the First National bank; don't know what brother did with his. Mother gave me a check for $638.00; did not surrender the deposit slip. I left mother's money at Mr. King's bank; drew it out and carried it to the First National, if I make no mistake, the 12th of December. I deposited it in the First National bank in my name. She has the money. She has got the money herself. I don't know where she has got it. She has got it put away. I have not seen it, but I can whenever I choose to. I know I got every dollar of that old lady's money. I know I have. He handles it when — chooses to send him to town for anything. He makes investments for her; does any time she wants rations up town. She send- by Mr. Stinson and he sends them to her. She don't keep money in her stocking. Stinson didn't give her the lot she lives on. It is mine. I bought it from Mr. Stinson.

J. W. STINSON sworn for the Government:

My name is Wesley Stinson. I am a preacher, living in Rome; do know Lucy and Clarisse Burrell; was present when Mr. Ballew had a conversation with Lucy Burrell about this pension money. He came out to my house one day on Saturday evening. When he first came up he said to Mrs. Burrell, "Lucy, I heard you had been to town about getting that money. Lucy, I thought you were satisfied about that money." He says, "Now, Lucy, there is no
37 use in going to law about it, because I don't want to be punished and I don't think you want to punish me," and she says no. He says, "If the money is what you want, you can get it;" and she didn't answer him very much, and he says, Probably you had rather go to town and get your lawyer and let me get mine and let them settle it for us, and she said yes. He asked her what time would she like to meet, and they agreed on 9 o'clock. He asked her where at, and she told him at Lawyer Wright's office. That was on Saturday evening, and on Monday Mrs. Burrell didn't go, but sent me for her. I went down on Monday morning, but could not find Mr. Ballew at the office, and that was the end of their subject there. I met him after that, and we had a little private conversation. I guess it was about three weeks after that, more or less, that I met Mr. Ballew upon the streets, and he asked me wasn't I the man he met over in the Fourth ward laying stones, and I told him I was, and he asked me did I remember him coming to me to buy a little piece of property, and I told him I did. He asked me did he tell me who he wanted it for, and I told him he did not, and then he asked me if I would come before the grand jury, in Atlanta, and testify to that. He said that would do him good. After that he went off, and some time after that he left me again and desired to write an affidavit to send in before the grand jury, and after so long a time I refused to write it. He asked me what I thought the old lady would take as a compromise, and I told him that I thought she would compromise for a thousand dollars; that if he would give her a thousand dollars I told him I thought she would make the compromise. He
38 said, Well, I don't think I can pay that or any more than it would cost me in law. That wasn't much of a compromise so far as my side of the matter was concerned. It didn't appear so. That was about this question. I don't know what he meant any more than what he said. I told him I thought she was willing to take a thousand dollars. He said he couldn't stand any more than the cost and the lawyers' fees. That is the way he turned off. He was in the act of turning off then. I don't know whether he seemed anxious about it or not. That is the way he talked about it. There was a suit pending in the State court for the money after Mr. Fitzpatrick come there and got things stirred up. There was a suit pending, I suppose. I think I was talking about the suit when he made the reply in the way stated. I think that is the time. I employed counsel. She told me to go down and get them. I have been looking after her business pretty generally, only the

day that Mr. Ballew was there, on Saturday, and on Monday she turns it over to me to see if I could make the compromise with Mr. Ballew. I knew the old lady before she got the pension money. I have been acquainted with her nearly all of my life. I was not looking after her business up to that time. I knew her daughter before that time. She was living with a woman by the name of Mrs. Rush—a colored woman—that is, she was staying there. I think she was working out somewhere. Mrs. Rush generally washed. I don't know what else she did. She washed for a living; did visit at Mrs. Rushe's house occasionally. Up to that time Clarissa and her brother had not had much to do with each other. They had always lived right there, near together. I sold some of them some property—the girl. I think I got 34 or '5 dollars for it. It was a small place. I suppose Aunt Lucy has money now. I don't know whether she has or not. I go to town and do her trading whenever she wishes for me to. I have to trade for myself, and she gets me to buy her rations. I am not sorter looking after that business generally. I am a married man. I am living with my family. I have a wife and children.

With the testimony of J. W. Stinson counsel for the United States announced their case closed. Whereupon counsel for the defendant moved the court to direct a verdict in behalf of the defendant on the first count of the indictment upon the ground that the same had not been made out, the money having passed from the control and custody of the Government into that of the pensioner, and upon the ground that from that time forward it was under the protection of the laws of the State, and that the crime made out was an ordinary one of cheating and swindling and no violation of the pension laws. This motion the court overruled, and an exception was then and there taken and duly noted by the court.

JOHN H. REESE sworn for the defendant:

I live in Rome, Ga. I am member of the legislature. I am a lawyer. I have practiced law 15 years. I know the defendant, A. W. Ballew; have known him 6 or 8 years. I think I am acquainted with his general character for uprightness and honesty in the community which he lives. It is good. I never heard of Mr. Ballew being connected with pension frauds in the case of the heirs of Jordan Freeman; don't know anything about that case; wasn't in Floyd superior court. I think I heard something about some garnishments. I heard that there was some money paid over and that somebody had garnisheed the money. I can't say that I heard that he swindled anybody, but I heard there was some money collected in some way. I think it was pension money, collected by Mr. Ballew; that was my impression. I heard that the money had been paid in the hands of some attorney and garnisheed. I don't know. I just have a faint recollection of having heard something of that sort. He stands very fair, so far as I know. He has been merchandising and he has been a pension agent and trades about there. I never heard his character discussed particu-

larly, except upon the subject now enquired about—this pension business. I have sent a good many to him I know, relying upon his integrity and honesty to do what was right about it. I state on oath that his character is good, and that I would believe him on oath. I consider him an honest man.

JAKE MOORE sworn for the defendant.

Direct examination by Mr. GLENN:

41 I live in Rome; have lived there about 43 years. I know the people of Floyd county pretty well. I think I — known A. W. Ballew about 8 or 10 years. During that period he has lived about 8 years in Rome. He has lived from 300 yards to half a mile from me. I am sheriff; have been for 16 years. I am acquainted with the general character of A. W. Ballew for honesty; it is good. I consider him an honest man; do know about that case in the heirs of Jordan Freeman. I know that there was such a case in the State court. My recollection is the Freeman heirs got a judgment against Mr. Ballew. That money, I think, was paid to Mr. Ewing. That find, I think, was garnisheed, but I am not sure Ballew did it. I am not certain about that. I never heard that Ballew had it done till this morning. I don't think I ever heard of Ballew's connection with other pension swindlers in that community. I did in one case write a letter to the department in connection with Mr. Ballew. I don't know whether I ever wrote letters in more than one case or not. Complaining that the pensions were not legal? No, sir. I remember writing one, but I don't know whether I wrote more than one or not. Mr. Ballew's standing is good. He has got a son, but whether he is connected with the post office or was at that time I don't know. Probably he was in Sept., 1892. I am not certain about what business he held. I have seen him about the general delivery, and I am inclined to think I have seen him carrying mail, but I am not certain about that.

DAVE WYLY sworn for the defendant:

42 I live in Atlanta. My business is commissioner of public works. I was connected with the Western & Atlantic railroad twen-y years. I have know- A. W. Ballew 25 years. I am acquainted with his character for uprightness and honesty; it is good. I consider him an honest man. I have seen him in the city lately. I have seen him quite often in the last 5 years. I have been in his house in the last five years. I went there on business. We were speculating on some land in Gordon county. We still own the land together.

J. B. CHAMBLEE sworn for the defendant:

I live in Rome, Ga. I was subpœnaed by the Government; have lived in Rome about 5 years. I am engaged in the saloon business. I know A. W. Ballew; no relationship whatever, as I know of, exist between he and I; his brother works for me and

have been working for me about 3 years. (Exhibiting check to witness.) That is my handwriting; the signature on the back of the check is my handwriting. I could not tell you whose handwriting the endorser of Lucy Burrell is on the back of the check. I see the name of Johnson there; it is in his handwriting. About this pension check, I was called to Mr. Ballew's office to witness this signature of Lucy Burrell, and when I got there Judge Johnson was there, and Lucy Burrell made her mark to it and Judge Johnson witnessed her signature. I don't recollect exactly what was said; it was understood that it was a pension check she was receiving from the Government; explanation was made to her of what was being done; Mr. Ballew remarked that she had this
43 check and had to have it endorsed, and that it had *it* to be attested by two witnesses, and Mr. Johnson and myself attested the signature before she could get the cash. Johnson was the ordinary of Floyd county at that time; he is dead; he was ordinary of Floyd county and had been so for 20-odd years; he was a man of fine character. I did not have any interest in that pension check—none whatever; did not have any interest in it whether it was endorsed or not—not a particle. I suppose two or three hours later on the same day I was called back to Mr. Ballew's office, and then I drew this check; when I got back there to the office I found the old lady and young Ballew in the office—that is, Hurley Ballew—and Hurley remarked to me that the old lady wanted to give him a check for half the amount she received and asked him to write it. I asked her if that was true, if she wanted to give him a check for this amount, and she says yes, and then the question arose as to how much it was. I think the check had been deposited in the bank and she received the deposit slip. I know I made the calculation myself and told her what half of it would be. Well, she says, if that is half of the money, draw a check for that amount. I drew this check then, for $1,887.34, as half of this pension check, and she put her mark on the signature, and she knew what she was doing when she did it. I never heard of any $25,000 check until yesterday. I don't know that I took any trouble in regard to that money, but I asked her if she wanted to pay this amount of money, and she said she wanted to give him half of the money she had received. I don't think A. W. Ballew was
44 in the office at the time this check was being drawn, but about the time it was completed he and Judge Johnson came in. I don't think Judge Johnson was present when the check was turned over to Hurley Ballew, but before I got away from the office he came in. This $1,800.00 check, I don't recollect whether I left it on the table or left it with the old lady or with young Ballew; as soon as it was signed I didn't take any notice of what became of it. I am sure Mr. Johnson got there before the $1,800.00 check was carried out of the office; he must have come in before Hurley Ballew had time to get away; he came in while the old lady was still there.

Cross-examination by Mr. RUCKER:

I did business in Rome. I was in business there in Sept., 1892. I was engaged in the liquor business. My business was in the Central Hotel building, on Broad street, and the other on 5th Ave.; I have two. Ballew's office is on Broad street, five or six doors from the opposite of my place. When he sent for me I was at the hotel place, 60 or 70 yards; the second time I was at the same place. There are no other offices up there where he had his office. I think it is the only office upstairs in that building. There are hundreds of men around there nearer than I; quite a lot of men who did business, clerks, etc. Probably a hundred could have signed the check that were nearer than I was. When I signed this pension check I went back to my saloon. No one was in the saloon but myself and the two clerks. One of my clerks is the brother of Ballew, but he didn't work at that place. Hurley Ballew had a market, but I don't know what he was doing then. There
45 was a firm of Ballew and Co., who was doing a kind of drug business. I have only seen Lucy Burrell a few times. I do not know whether she was ever married or not; do not know whether or not she is a widow. That is my signature. I read all above it since that was made.

The WITNESS: I have examined the paper.

Q. Didn't you sign this paper?

Do not know whether both children mentioned there are alive or not. I knew nothing about that. I signed that signature as to her signature and not as to anything what was in it. I put my name there, intending to attest the old lady's signature by mark, and there was no question of widowhood, but merely an affidavit as to her signature. I hope I have not been very active in keeping the Government off of Mr. Ballew on this case. (Hands paper to witness.) That is my handwriting. Hurley's office and his father's office are both in the same building; the same room. When I went in there and when the old lady endorsed the pension check there was some conversation going — between old man Ballew and the old lady with reference to real estate, houses and lots, and so on. I got an idea, although it may have been a conclusion of my own, that she was going to invest the money in real estate of some kind, and when I was called back a few hours later I don't know that anything was said about real estate, but I got the idea, from real estate being discussed before, that this $1,800.00 check was in payment for a house and lot. It was merely a matter of attesting the signature at first, and when I was there with Mr. Ballew again the old man came
46 in with Judge Johnson the second time, and he said then that the old lady wanted him in examination of some deeds; that she wanted to give him the power of attorney to act for her in examining some deeds or some real estate that she wanted to buy, and when I was there the second time, when this $1,800.00 check was drawn, Judge Johnson and Mr. Ballew drew up some instrument of writing empowering him to act in examining some deeds

for the old lady. I don't know whether I was sent for on those transactions both or either one particularly. Mr. Ballew told me that there was never any real transaction between them. After Mr. Fitzpatrick came around there he asked me what I knew about the consideration. Mr. Ballew came and asked me if I had been interviewed by Mr. Fitzpatrick, and I told him yes. He questioned me about this $1,800.00 check; I told him I thought it was for a house and lot, and Mr. Ballew then told me that she gave it to Hurley.

Redirect by Mr. GLENN:

Yes, sir; yesterday Mr. Rucker and I had a consultation, and the question arose over which Ballew was intended to be referred to in the affidavit. He wanted to impress upon my mind that it referred to A. W. Ballew, when my intention was to define Hurley Ballew, when the affidavit seemed to have defined A. W. Ballew. At that time he merely remarked to me, This is a serious matter. He said, I had been seduced in signing that signature and attesting the old lady's signature at the same time, attesting to her widowhood. He showed me that paper and told me that I had attested to her widowhood, and that it was also criminal negligence on my part. It seems that — attested to her widowhood,
47 when I thought I was only attesting to her signature. He was trying to get me to admit that Ballew in one of the papers meant A. W. Ballew, when in fact it meant Hurley Ballew. I think that was it. He told me that it meant A. W. Ballew, and I told him that was an error and I didn't understand it that way. The district attorney may have thought that where the affidavit said Mr. Ballew that it referred to A. W. Ballew, and I told him it referred to Hurley. The affidavit he referred to was one taken about June, 1893.

Q. In that conversation with A. W. Ballew, the defendant here, what did he say was the basis of that money given to Hurley Ballew?

A. What did A. W. Ballew say he done as a matter of inducement to her?

—. Yes.

A. I don't know anything, only that he prosecuted this pension claim, and as to what he had to do with Hurley I don't know that he ever said anything. I think he told me that he got his fee from the pension department as attorney.

Q. That is all he ever got?

A. That is all he got, I think he told me.

Q. That he got his fee from the pension department?

A. That is all he ever got.

Mr. RUCKER: What were you trying to prove, Ballew's declaration?

Mr. GLENN: Yes, sir.

(The COURT:) You need not consider that, gentlemen of the jury.

Mr. GLENN: I was asking him about a conversation that Ballew had with him as to the consideration of this check, and I want

to prove all that Mr. Bellew said in this same conversa-
48 tion.

(The COURT:) It is ruled out. You need not consider it, gentlemen of the jury.

To the exclusion of this testimony an exception was then and there taken and duly noted by the court. Counsel for the defendant contended that it was part of a conversation which had been drawn out by counsel for the Government in the cross-examination of J. B. Chamblee, and that they were entitled to prove all which was said. The court, however, excluded the testimony and withdrew from the jury all that Chamblee swore as to Ballew's statements above set out; which ruling is now assigned to error.

HURLEY BALLEW sworn for the defendant:

A. W. Ballew is my father. I did live in Rome. I am here now and guess I will live here. I am working for the express company here. In Sept., 1892, I was in the drug business, building material, and paints, and I carried a line of groceries also, in Rome, Ga. I don't remember when I first got acquainted with Lucy Burrell, the pensioner in this case. It was when she came to my father's office and employed him to get her a pension. She asked my father about getting it through, and he told her he couldn't go around and hunt up all this testimony and carry the expense of it; that if she could get some one to do that—get me, and I was willing to do it. I had to get up testimony showing that her husband was killed in the army and showing that she was the wife of a soldier. I have heard of Judy Burrell. After so long a time we found that
49 there had been a fraud practiced in the case, and that her daughter, Judy Burrell, had drawn part of the money. We thought we had the case about complete, when we found out that it required proof that the real Lucy Burrell was living and was the wife of this soldier. I hunted up part of the testimony on that point, and I think father may have gotten up part of it. I was in Rome when this pension money come. I first saw the pension check up in the office. I don't remember what day it was. When I saw it me and father and Lucy and Charley were there. Charley is out there (pointing to the hallway). He is her son. This check for $1,800.00, payable to my order, is the check that Lucy presented to me for doing the work, I suppose. There was nobody present when this check was given but Mr. Chamblee and myself and Charley. She was asked about it by Mr. Chamblee, who wrote this check, and she told him that she wanted to give him half of what she had in the bank, and to write a check for half of the amount. Mr. Chamblee divided it and told her how much it would be, and he says, That is right smart of money; is that what you want to give Mr. Ballew? And she says, That is exactly what I want to give him. He has worked hard and faithful, and I feel like I am doing right in giving him that much. Nothin' was said about the check for $25.00 in favor of Charlie Burrell. She knew how much that was; Mr. Chamblee told her how much it was. He divided

what she had in the bank and told her how much it was, and she said that was exactly what she wanted to do. She understood that the check was for $1,800.00 of her money; Mr. Chamblee explained to her. Father had not a thing on earth to do with the transaction. My father was not present
50 when this check was given. I went to the bank and got the money myself. I brought that envelope containing the check up to the office myself. I got the letter out of the post-office box—out of her box. Charlie gave me the key. He carried the key for a long time. Charley Burrell—his name is Quintard—I suppose he is 30 or 35 years old. He was working, running a dray, and he remarked to me one day, he says, I haven't got time to watch the post office, and he gave me the key and says, When any mail comes let me know, so I can attend to it. He gave me the key and I went down one morning and this letter was in the box. I carried the letter to the store; that was some time in the evening. I didn't get to see Charley that evening, and I turned the letter over to Bruce Harris, a partner of mine, and he put the letter in the safe. The next morning my father saw Charlie and told him the mail had come containing the check, he supposed, and to go and get his mother and bring her out. Charlie got off the dray and went after his mother. I think I loaned him my wagon to go after her. He brought his mother down to the office and they come up in the office and my father was up there and handed him the letter and he gave it to Lucy Burrell. I don't remember who broke it open, but anyhow it was broken open, and it contained the check from the Treasury Department. When the original check was endorsed by Lucy Burrell I don't think there was any one present except Lucy and myself and father. Do know these handwritings. That is Mr. Chamblee's and Judge Johnson's, the ordinary.
51 They witnessed the signature. After they witnessed the signature, until that $1,800.00 check was turned over, I don't how long it was; it was during that day. This check was given to me after she had deposited her money—after she had gotten the check cashed and deposited the money in the bank. She came back up to the store and asked me when to come up to the office. At this time my father, I think, had gone to the court-house. He was not up in the office when we went up there and when she gave me this check. Charlie gave me the key to the post-office box. I don't remember what day it was. I don't remember how long before the pension check came. I don't remember the time, but it was some little time; it may have been a month. Charlie was working on the dray; couldn't go to the post office himself, he said. He kept the key for a long time himself. I don't know exactly how long I had had the key when the check came; it may have been a month. All the mail I received out of this box I think was this check. All the mail that I ever got out of that box was the voucher and check. I had a brother working at the post office. I got the letter some time in the evening, I think. As soon as my father found the check had come Charlie took our wagon and went for the old lady. Why the old woman didn't pay this money at the bank and

why she didn't settle in the bank I don't know. Got Mr. Chamblee to write the check. I wanted somebody present. I thought it would be proper if she was going to give me anything to get Mr. Chamblee or somebody else to write the check. He lives right across the street from my business. There were people nearer than Mr. Chamblee. Mr. Chamblee
52 had endorsed the other check or witnessed her signature to it. The old lady didn't pay this money. I went to the bank and got it. I did not say anything about the old lady settling with me. I didn't know whether I was going to get any money or not. Evidence I examined for the old lady. I went to see an old lady out there in the country who was her old mistress. I went there with Lucy. I don't remember the time. I suppose about ten miles. We went there twice, Lucy and myself, and I went one time to Mr. Jim Darlington, about 12 miles, I suppose. He is a relative to the old lady I went to see before. When we got there it was about 11 o'clock. We got back some time in the evening. We were driving one horse. I went back again, as we had some other proof to make. That was not sufficient. We made three trips in all; took Lucy every time. The point we were trying to show out there was that she was the widow of a soldier that was killed, and I think we had to show how many children she had; did take three trips to do just that much; don't remember all of the things. I don't remember that I have rendered any service in this case except that one solitary instance. I propose to show that this old woman gave you an $1,800.00 check for going down there in the country three times. After we had come back from the bank and she and Charlie come up there to the office—that is, Quintard, her boy, and the one that was present when she got this check and deposited it in the bank—Charlie then says, Mother, what are you going to do for Mr. Ballew? and she says, I am going to give him half of it. Chamblee
53 was not there then. I says, Whatever you are amind to give me, Lucy, I will get some one to draw the check for whatever you are going to give me; and I went over and got Mr. Chamblee and brought him over, and she explained to Mr. Chamblee what she was going to do—that she wanted to give me this money. I don't know that anything was said about a pension or for what I had done or anything of the kind. Chamblee just drew the check for $1,887.34, and what it was for was never mentioned in his presence. This blank check was there in the office. We keep blank check books there. My father's office was right upstairs over the business, and I don't know whether I got a check out of his office or whether I went downstairs to the store.

A. W. Ballew, defendant, sworn:

I live in Rome; have lived there with my family nearly ten years. I worked in Rome from 1885. I have been engaged in the pension business about 25 or 26 years—ever since 1865. I was not admitted to practice before the department at that time. I worked with parties at Washington part of the time. I don't know how

long I have been admitted in Washington; quite a number of years. I appear on the rolls of the department as one of the attorneys in that branch of business—the Treasury Department, the Department of the Interior, and the War Department. I had all classes of claims against the Government. I first become connected with
Lucy Burrell about the year of 1890. The case came to
54 me—knowledge of it came to me—through some of the
claims that I was working; I don't remember who it was. One, you know, would lead on to another, and work would come to me in that way. One soldier would know about another soldier, and then I would have circulars that I would scatter around all over the country. I suppose she came to see me. She claimed she was the widow of Michael Burrell, but could not tell what became of him. This difficulty about Judy Burrell was after I filed the claim for pay and bounty in the Treasury Department. They claimed that it had been paid. You see, the department won't give out any information about these things and there is a statute to prevent the officers giving information. This soldier had been captured by General Hood and was taken prisoner of war, and I think was killed or died in prison. It was a difficult and hard regiment to work in and the department wouldn't give any information about it. Hurley's connection with it came up this way—about the information coming from the department that this first widow had drawn the money; did not know of any arrangement or connection with my son and her in reference to work he was doing in the case; I didn't know anything about it. I would not do this field-work; I had my office-work to do and could not do this field-work. I had to have help all over the country; in fact I never found a colored claimant who could complete their claim without some local help, and that is the reason that the Government keeps men like Mr. Fitzpatrick to do this work. She had a son who was working
in Rome, and this son made arrangements with my son to
55 help him find some of his proof to show that this Judy Burrell was not who she claimed to be. There is a great deal about that Judy Burrell matter that I could not state, because I don't suppose it would be legal.

It is a matter of difficulty to trace up these things. It was a hard claim; it was a very difficult claim. I didn't much believe that the claim would ever be paid. Before Mr. Fitzpatrick got into this claim there was another examiner there. I don't remember who he was, because they were so plentiful all over the country; but there was another examiner who came into this claim and really did complete the work in it. It was never *was* completed by me until this examiner done a lot of this work, showing that the first wife was a fraud and that this one was the real, lawful wife. I can't carry dates, but we were working on it for several years; probably since 1890. I don't remember what time in 1890. It took us some time in 1892—July or September—to get it through. I did some work in the War Department in trying to trace this soldier, I think, in 1885 or 1886, but that was not in the Pension Department. I don't remember when I first got word of the actual presence of

the check in the city of Rome; I don't remember whether my son told me or whether he brought it by that evening or not. My office was up over the store that my son and Dr. Bruce Harris was running. My office was upstairs. This Charlie, her son, was working for a man by the name of Bosworth, who was running quite a number of drays, and I met him on Broad-street facing, and I caught his eye and motioned for him to come to me. He came up in my office, and I told him that
56 my fee check had some, and I supposed his mother's check was there, and that he could give his mother notice that she could get her money by going to the bank. He said he would get some one to go drive the dray, and he would go and bring his mother down. About the key to the post office—I don't know anything about it. I never heard of that until this case came up. He brought her into my office. This Clarissa was not present then. I didn't know much about this Clarisse, because she never came up there. My office had a little railing running across it in it, and the witnesses and claimants would stay on the outside. They came up there, and I don't remember who handed me the envelope containing the check. I don't know whether it was my son or Charles, but the old woman was there and told me to open the envelope, and I tore open the envelope and found vouchers for the next quarter. I explained — the old lady what it was and explained how she would have to get her money from the bank; that she would have to have it endorsed, because they were very particular at the bank about cashing these checks. The assistant treasurer in New York is extremely peculiar. I always try to get competent witnesses to attest these checks, for the bank requires it. I had Mr. Johnson, the ordinary, and Mr. Chamblee to come up there and attest the signature. I don't remember whether my son went after these attesting witnesses or not, but they come in. These endorsements were all explained in this way: that she would have to go to the bank and send her check to the assistant treasurer
57 in New York, and if the bank would discount it probably she could get the money here. I think when I got notice of my fee check I spoke to Mr. King about having a large check that he would have the handling of. I did business with his bank, and the store did business with his bank. After explaining to her about these endorsements I went with her to the bank for Mr. King to see who she was, and he cashed the check. I don't remember whether he was out in the front of the bank or not. Anyway, I remember we walked back into his office. He had an office in the rear of the bank, and we went in there, and I identified it. He asked her the question as to what she wanted to do with the money. He spoke to her about the danger of carrying so much money home, and she said she didn't want to do that; that she wanted to leave it in the bank, and he told her that it was a large amount; that she could leave it there and get it whenever she wanted it. Either there, at our office, or at the other place of depositing that amount in the Merchants' National bank I never did advise her one word about it. When I left the bank they had counted the

money out in her hat, and she walked around to the cashier's window. It was quite a package in her old straw hat. I went from there to the court-house. The cashier was giving her credit for it and giving her a deposit slip. I went from there to the court-house. My business at the court-house was with reference to this deed for some property that this old fellow Stinson wanted to sell this old woman. I didn't know Stinson and never heard of it until she told me of it. He wanted to sell it to
58 her for $100.00. She had instructed me to look into it and see about this deed, and I went into the court-house to see if I could get any trace of it, and I never did. The girl came back later on about the lot and told me that she had a lot, and that she was going to build on that, and not to bother about the Stinson lot. When I got back to the office with Mr. Johnson I met Mr. Chamblee and Lucy and my son and her son coming from the back office. My office had a division in it, and they were in the back office. Mr. Johnson talked to Lucy, the pensioner, about the danger of losing her money if she gave it to Stinson, and that she had better know if she was getting a good title, and then he sat down and wrote some instrument for me to go out and see about it, and I did go to see Stinson, and then afterwards this girl came back and told me what I have stated. By way of suggestion or any other way, with the amount she gave Hurley or with him giving him any amount, not one thing on earth at that time or any other time did I have anything to do. With palming off this $1,800.00 check on her as the $25.00 check payable to her son Charlie, I never heard of it until it came up in this trial; did not advise or suggest that she invest it in a house and lot; not a word. I knew about that $1,800.00 arrangement that same day. My son told me what she had done. After Mr. Johnson and Mr. Chamblee had gone away he told me what she had done, and I spoke to him, it being a matter that was of his own, and that I had nothing to do with it.
59 I will state right here that my son and Dr. Bruce Harris use my name in connection with their business, and I had a written obligation with my son and Dr. Bruce Harris that I was not to share in the losses or profits of the business. I was trying to help my son along, and Dr. Harris was an experienced man in that line of business, and they used my name in this business, and we would pass checks back and forth. I would let them have money sometimes, and they would let me have money back. (Exhibiting book to witness.) That is an account book which I kept in my desk for the purpose of keeping an itemized account with the various persons who came to me to run them for supplies and goods. There is an account here started with Charlie Burrell, and — is proper to state that this dates back to Sept. 3rd, 1898, and says to cash, $3.00; that is correct. Her son Charlie got that $3.00. That was entered up at that time. Other items are there. There is cash to his mother and then there is $10.00 that Charlie got himself. I only know about that, though, from what he said about it; then there is one dollar that his mother got; that makes now $14.00. There is an account here with Lucy Burrell where I charged her with $25.00.

She got that when she went to Chattanooga to see her sick daughter. Now, I want to explain about this $3.00. This man Bosworth refused to let him have the money, and Charlie said his sister was sick, and they got a telegram that she was dying, and said, If you will let me have it I can go to Chattanooga, and if you don't I will have to beat my way on the train; and I let him have the $3.00. He
60 then came back and told his mother that his sister could not live, and him and his mother made arrangements to go to Chattanooga, and she came to my office and asked me to let her have some money and told me the condition her daughter was in, and that she wanted $25.00 for this daughter in Chattanooga. Charlie said they would have to bury her. I don't think they had been gone but one day until Clarrissa came to my office and said she had had a telegram or had gotton notice of her sister's death, and that she wanted to go to her burial, and she got $10.00 then. They had gotten from me in cash $49.00. Afterwards Clarissa and the old lady came to my office and said they wanted to pay me back this borrowed money, and the old lady says, If you will let me have $25.00 more it will save me from going to the bank; and I says, I can accommodate you; and I did it. That made $74.00, and I drew this check for $74.00. It is witnessed by Dr. Bruce Harris, who was a partner of my son and in business with him, and it is endorsed by me the date of Sept. 6th; that is the transaction about that check just like it occurred; did explain to her these items making up the $74.00, and *sch* said she wanted to pay it, and she gave me a check for it and knew what she was doing at the time. About that $74.00—it was just like swapping dollars. I didn't make one cent out of it. I had no arrangement, understanding, or contract with reference to getting an illegal fee in this case, not one word in the world, and she has testified to this officer just a short time before, and I remember her language to the officer. He asked her this question, which they all do, and she swore
61 this: that she had not made any contract to pay anybody anything, and said that she wanted to do what was right, for it was a heap of trouble. I did not get one cent beyond a legal fee in this case. I did never demand beyond a legal fee in this case one cent. I could not afford anything of that sort with the practice I had. It would be like betting a shoe-string against a tan-yard. Even if I was not dishonest enough I couldn't afford to do it, because my practice was worth more than any of their claims, and I could not afford to do it. Something has been said about that Freeman matter. They had gotten from me money to pay off notes and to pay their uncle, and to pay current expenses — the other, and in this case the soldier was charged with *di*sertion. There is no soldier who can draw pension as long as there is a charge of *di*sertion existing. Did have to correct that charge of *di*sertion in that case. The Freeman heirs had agreed among themselves to divide their money equally. It is this way about a minor: A minor can draw a pension until they are sixteen years old, and then it ceases. The younger one naturally draws more than the older one. They got some attorneys to see that these bills were paid to me, and they

found that this was not regular, and that they could bring an action against me, and they did it. He spoke about the case of Tom Peak. That was the case in which he had had a running account for in the store. He had had some trouble at this place with *fi. fas.* and debts; he traded up there and when he would have no money he would leave it with me. Captain Fitz-
patrick would not have known what was due that fellow
62 if I had not shown him the book. It was not retained
or withheld, but it was simply a business transaction, and sometimes I would be in his debt and sometimes he was in mine. Charges for retaining or withholding or exacting illegal fee in pension cases—are there two cases I refer to—has been brought against me. No charge had been made against me in court as I know of. If this is, I have never been given any notice of it. After telling Clarrisa that I had to go to Washington and bribe the Congressman—that is absolutely fabrication made up, and I never heard of it before. There was an arrangement in this case and could not be, and was not, required to have any special act. About friends in Atlanta, we had to go on from Atlanta. I never heard of that until she spoke of it here. There was never any such statement made by me; of course not. About the statement told by the old lady that she might put some money in my wife's lap, I never heard of that until they told it here on the stand; did not say any such thing—not a word of it. I never heard of it before. The statement by Stinson as to why I refused to compromise for any more than the amount that he says I ought to give, that was a fabrication made up by him. There was some talk about there that I had kept money that I was not entitled to and wanted to get into something about the facts, and I knew he was a shrewd fellow and I wanted to see what there was in it. I went up there to his house; he stated here on the stand that he lived 50 or 75 yards away from
her house; their houses stand almost adjoining, right up to-
63 gether. After I got up there to the house—it is a new-built
house—since he got this money—Stinson and this old woman and Clarissa was sitting on the front veranda. I spoke to Lucy and told her I had come up there to see what there was about that Stinson lot, and to see what was the trouble. She pointed across the street, old Lucy did, and says, That was the lot over there what I was talking to you about; but, she says, Mr. Stinson gave this lot to my daughter, and then we want that lot, and we built this house here. She says this to me and says, I am dissatisfied in what I done to Hurley and Quintard; I paid them too much money. I just remarked to her that that is something that I had not anything to do with, and that she ought to not blame me for what she done. Some time after that I met this old negro on the street and he said, If I could have seen you before they brought this suit—there was a suit instituted in the city court for this money—if I could have seen you, we could have settled this matter. I asked him how, and he said, Well, I think we could have settled. He wanted to know how much I would give, and I says, I would not give you a cent more than the attorney's fee that I would be out. That is all I would have paid to settle

any such case like this. I have not had anything to do with it. That is about all that was said. I don't remember of ever seeing him afterwards. He told me that there was a man in Mr. Wright's office taking testimony, and he says, He will put you in the penitentiary before he gets through. I thought I would go up there and see him about this. I went up there and Fitzpatrick was sitting by
64 the desk, with his face towards a negro man. I went in and asked him if I didn't have the right to cross that witness, as he was working up a case of supposed illegal fees against this witness. He says, This is *ex parte*, and you can't do it. That was a new phrase to me, and I says, What do you mean by *ex parte?* and he says, It is criminal, and you can't cross it. I turned around and says, I will have my day some time, and I walked out. That was every word that was said in Mr. Wright's office. I then met him during his stay, probably that day, on East 1st street. I was going to the post office, and he was going up towards the courthouse. Captain Fitzpatrick asked me what was done about Lucy Burrell's bounty—that was the first time he had ever spoken to me about Lucy Burrell—and I told him they had reported that it had already been allowed, and he remarked, I believe they don't pay but one time. He went on his way and I went on mine. So far as that fabrication is concerned about my son marrying or was going to marry, I never heard of it until he spoke it here. The law don't require me to carry the expenses for my client. I made that contract. That is the general law; agreed to take that case for $25.00. That is what it states. I know a person by the name of Marguerite Egenberfer; do know of such a case as that. I think I remember that case. I was not in charge of swindling that payment out of a thousand dollars. There was a land transaction that they brought up involving me there in the settlement with her. I don't know whether she charged me of swindling her out of a thousand
65 dollars or not. I never had any case with any negro at Acworth that I know of. I don't remember the name of Edwards. I am engaged in settling up some business. This case has disbarred me from the pension practice. I don't deny that. I am insolvent. This store and this business made me so. Did pay back to a gentleman by the name of Ewing the sum of $900.00 for pension money. I paid it back on the direction of Captain Fitzpatrick, because I could not withhold it. Have been in the pension business for a number of years; have learned that I cannot pay other debts with pension money—had not done it then. In this case of Mr. Ewen, he told me I had my recourse, and I took it. I garnisheed for my debts, at least a part of them. That case was tried in court and they got judgment against me on one of them. This man Michael Burrell was lost. He did not have the charge of *dier*stion against him. A pension case is not based on the record in the War Department alone; other departments other than this—the Treasury Department. For the Treasury Department I had to prove merely that the marriage occurred between the claimant and soldier; that the soldier is dead, and you must prove his death. Hurley never filed any separate papers. Those are the papers, as near

as I remember, that I filed in the pension case. Did find out what become of this colored troop. I got it from a soldier who had been prisoners. The colored — that furnished me these names or other names are about a thousand. About this one that come to my office and told me about Michael Burrell, there were quite a number. I could not call the name of the regiment. Tom Peak was one. Of that $900.00 I paid back on Mr. Fitzpatrick's direction, as to
66 money advanced by me in the transaction of that claim, I could not tell now unless I could get to my papers. That claim was held up for an additional appropriation by Congress; did *may* the $900.00. I paid it under the statement of Capt. Fitzpatrick that I could not withhold it, and that it would disbar me, and he said I had my recourse to the courts. I went into the courts on my own account. I garnisheed it to get my money. There wasn't but $900.00 in it. I think it is necessary for me to make a little statement here. I want to state this: that the bounty and monthly pay of that soldier that they brought that suit, the money that I never had seen and had never had anything to do with. I never had withheld any money at all.

W. J. NEAL sworn for the defendant:

I live in Rome. I have lived there about 5 years. I was born and raised at Adairsville, in Bartow county, and then I lived in Gordon county for several years, and then I went to Cartersville and lived for four years, and then I lived in Washington four years, and since then I have been in Rome. I am a lawyer. I was representative in the last legislature from Floyd county, and I am now a member of the council and mayor *pro tem.* of the city; have know- A. W. Ballew, the defendant here, ever since I can remember, I will say 20 years; am acquainted with his general character for honesty. I should say it was good; as far as I know, certainly.
67 I have heard his character discussed only in a political way, but not as to honesty or veracity; never heard that discussed; don't remember that I have ever heard any question raised on it.

C. T. CLEMENTS sworn for the defendant:

I live in Rome, Ga. I have been living in Rome and East Rome ever since 1893. I was solicitor general of the Rome circuit for three terms; have known A. W. Ballew since 1862 or 1863. I was in the Confederate service, and was in the same battalion, but a different company. I was — member of Company C and he was a member of Company F. I an- he served together; I don't know just exactly how long; perhaps two and a half years. After the conclusion of the war he was living there in Gordon county, and I a portion of the time in Walker, and then I came from Walker to Rome. I was not living in the same vicinity and would just meet him occasionally, perhaps as much as once a year, until about 5 years ago, when he came to Rome. After he came to Rome I was

in ill health and lived in one of the suburban villages and did not meet him as often as since I get about more. I think I am acquainted with his general character for honesty; it is good.

O. N. STARR sworn for the defendant:

I reside in Gordon county. I was born in the county. I am a lawyer. I was admitted in 1879 or 1880; have known A. W. Ballew, the defendant, since I was a boy. We were in the same county. I suppose his father lived from mine about 5 or 6 miles. I think I am acquainted with his general character for honesty; it is good.

68 WILLIAM BRIDGES sworn for the defendant:

I have lived in Floyd county 8 years; have known A. W. Ballew, the defendant, intimately that long. I live about 200 yards from him. I am acquainted with his general character for honesty and veracity; it is good as far as I know.

A. W. BALLEW recalled.

By Mr. RUCKER:

I drew up the power of attorney authorizing me to examine that title. It was to give me authority to see whether she could afford to buy that lot. The power of attorney was to find out whether she could invest in this Stinson lot; whether it would do to buy it at $100.00. The papers tendered in evidence here from the department were filed in services rendered in obtaining this pension. All I have seen, so far as exhibit-ng to me, is strictly in the Pension Office. I worked in the Treasury Department, Second Auditor's Office, and the War Department. I don't think I answered the question yesterday in rebuttal to Mr. Fitzpatrick about something that occurred on the 9th of June that I would let all pension money after this come to the pensioners. I want to state that it would have been impossible for me to have controlled their money. They are always addressed to the claimant, and it was an unreasonable statement that I could have any control over it. So far as the Rome post office is concerned, they have a large safe, and if the parties haven't a box, as far back as I can remember, all these pen-
69 sions go into that safe and no one can get these letters but the claimant. If the claimant is not known, they have to be identified by some one to the office, and that sort of a statement about me letting them go to the pensioners is unreasonable, because I had no control over them. The examiner- that worked in this case in the preparation of proof, besides Mr. Fitzpatrick, I can't call the names of them, because there are so many of these fellows travelling about. One came here a short time before this claim was allowed and went through this case as to its merits to see whether this widow was the widow of the soldier or whether this Judy Burrell who had drawn money was the actual widow. As to witnesses that examiner took, I don't know how many. He made a thorough examination of it. The Treasury Department, so far as the pension

is concerned, had nothing on the face of the earth to do with this case. Services other than those papers filed there with proof there, I don't think I filed any other papers. I can't remember. All I did in that pension, so far as I know, is embraced in that package of affidavits. I don't know what I did in any other department.

Upon the conclusion of evidence and after the argument counsel for the defendant then and there requested the court to charge the jury as follows: "When a pension check is delivered to a pensioner and she takes the same to a bank and has it cashed and then deposits the said fund in a bank and takes a deposit slip therefor, the fund loses its nature and character as pension money, and the ordinary relation of debtor and creditor exists between the pensioner and the bank, and if thereafter by and device or in any way whatever the pension attorney obtains a draft from her and draws it out of her general account he cannot be convicted of withholding under the 5485 section of the Revised Statutes, and it would be your duty to acquit him on that account if these be the facts as to that branch of the case."

70

This charge was refused by the court, and an exception was then and there taken and duly noted, and said refusal is now assigned as error.

The court then charged the jury as follows:

Charge of the Court.

GENTLEMEN OF THE JURY: The statute on which the indictment in this case was founded is as follows: (Reads statute.) The part to which attention is called in reference to fees which are allowed attorneys provides that they shall not have more than $10 except by contract; that they may contract for as much as $25.00. So that any amount in any event, by contract even, in excess of $25.00 contracted for, demanded, received, or retained, would be a violation of this statute. This indictment contains two counts. The first count in the indictment charges the defendant with withholding pension money out of the pension of Lucy Burrell to the amount of eighteen hundred and odd dollars. The second count in the indictment charges him with receiving more than the amount provided for by the statute for his services and procuring this pension.

71

Some questions are conceded to be true; some facts of the case about which you will have no trouble at all. No question is raised here by the defendant as to his being the attorney for the claimant, Lucy Burrell, in the prosecution of her claim for a pension. No question is raised but that the check received from Mr. Rule for thirty-seven hundred and odd dollars was pension money when it was received and no question is raised but that she was a pensioner. Those questions are out of the way and are not in issue in this case. The first question which you will have to determine on the first count on the indictment is as to whether or not the money of this old woman, Lucy Burrell, was withheld from her. You see

what the language of the statute is and you have gathered from the argument and from hearing the evidence the question which will be submitted to you. Of course, the money of a pensioner should be paid over to the pensioner ordinarily and should go into the control and possession of the pensioner and should become his or her money, and thereafter the pensioner could do with the money what she or he might choose. After the money is paid to the pensioner and he or she gets possession of it and full control of it no one has anything more to do with it, and the pensioner may do with it what he or she pleases.

Now, the defense here is that the amount of the check received from Mr. Rule, the pension agent, really went into the possession of the pensioner in this case, and the contention
72 for the Government is that under the facts of the case the money did not really go into her possession in contemplation of the law, and they also contend that the attorney, the defendant in this case, could not withhold the money or any part of it by getting the check which is in evidence here for eighteen hundred and odd dollars.

Upon that branch of the case I instruct you this: If you believe that receipt of the pension check under all the circumstances connected with it and the possession of the pension check by the defendant in this case and the taking of the check to the bank and his accompanying the pensioner to the bank, the turning of the check into cash and the payment of the money to her, the physical possession placed in her by putting the money in her hat, the redeposit of the money in the bank, and the taking of the pensioner to the office of the defendant and the drawing of the check for eighteen hundred dollars—if you believe that this was all one transaction, arranged and designed by the defendant in this case for the purpose of getting into his possession eighteen hundred dollars of the money which the pensioner received; that it was a scheme designed by him, one continuous transaction for that purpose, and that he was a party to it and was the beneficiary of the money received, then that would be, in law, a withholding of the money under this statute and the defendant would be guilty and it would be your duty to convict him, but it would be necessary for you to believe that. The other
rule which I gave you is true and exists in law—that is, that
73 the money can be paid by the attorney to the pensioner, and that thereafter there might be a transaction between them which, of course, could be transactions which would be entirely legal and honest by which the cash could pass from the pensioner to the attorney, but that would depend on the character of the transaction. The jury will see the facts and I will state it to you again: that if all these facts or series of facts are one continuous transaction designed by the defendant and arranged by him, as contended for by the Government, for the purpose of getting into his possession eighteen hundred and odd dollars of the money of the pensioner, and that he did receive it or was the beneficiary of the receipt of it, then that would be withholding in the meaning of the statute.

Now, the facts in this case are for the jury to determine. The checks are in evidence and you will have them out with you. The check signed by the pensioner, which seems to be made to Hurley Ballew and endorsed by him, is in evidence and you will have that out with you.

If the jury believe that this money was paid over to Lucy Burrell; that after its payment she went to the office of the defendant, the office which is spoken of in the evidence here, and under the circumstances which have been stated by the witness she gave this check payable to the order of Hurley Ballew freely and voluntarily for his services to her or on account of her kind feelings to him for some reason, and the defendant had no connection with it and knew nothing about it, of course no question could be raised about
74 his guilt and he ought to be acquitted. It would hardly require instruction of the court to see that. The jury should take all the facts here and give them the weight you think they ought to have. Take the documentary evidence and the evidence of the witnesses in the case and see what you think is the truth about the transaction.

Now, there are the two theories. In the first place, the theory of the Government, which I have stated to you, and, in the next place, the theory of the defense, which entirely disconnects the defendant with any criminal act in the whole matter.

Now, the second count charges the defendant with receiving more than legal fees under the first part of the section which I read to you. As to that, the court instructs you that is simply a question of fact for you—simply a question as to who you believe in this case. The defendant testifies that he never received a cent except the $25.00 that he received from the pension agent at Knoxville. The old woman testified that she paid him the $74.00 check, which was given on the second day, and which was represented by him to be in compensation for his services, although, as I understand, she states that he represented to her that it was a check for $25.00. The check seems to be for $74.00. She stated, I believe, that, while it was given to him as compensation for his services, she understood it to be a check for $25.00.

I have been requested to instruct you that the proof must correspond with the allegations in the indictment; that is true, gentlemen, because the case of the Government must stand on the
75 facts proven; they stand on the testimony of this old woman as to how this transaction occurred. Counsel for the Government have asked me to instruct you that you must believe that this eighteen hundred dollars was obtained from her upon the representations made to her that it was a check for $25.00, and I so instruct you, that you must believe that to be true; but I state to you in that connection that the discrepancy between twenty and twenty-five dollars in her testimony is immat-rial. She states that it was $20.00, as it was represented to her, and the indictment charges that it was $25.00. This discrepancy will not be material; but this is all a question of fact for you, gentlemen, to determine. The

court, of course, expresses no opinion about the facts, but they remain for you to find; they are exclusively for you.

If you believe from the evidence that this defendant received more than twenty-five dollars for his services from this old woman in procuring her pension, he ought to be convicted under the second count in the indictment. If you do not so believe, he ought to be acquitted. As I stated to you, there are two counts in the indictment. If you believe him to be guilty of withholding the money under the view I have given you of the law, and that he is not guilty under the second count of the indictment, you would so express it and say, "We, the jury, find the defendant guilty under the first count." If you believe him to be guilty under the second count and not guilty under the first count, say, "We, the jury, find the defendant guilty under the second count." If you believe him to be guilty under both counts, say, "We, the jury, find the
76 defendant guilty." If you do not believe the defendant to be guilty under either of the counts in the indictment, say, "We, the jury, find the defendant not guilty."

Now, gentlemen, the defendant offers evidence to show his general good character. I instruct you that evidence of that kind goes to you to have the weight you think it ought to have. In that class of cases where there is some doubt, it is deemed sufficient in law to turn the scales in favor of the defendant if the jury should think it ought to have that weight. It is for you to give it the weight you think it ought to have.

There is some conflict in the evidence here, gentlemen. There appears to be a conflict, and in a case of that sort the jury should endeavor to reconcile the evidence, if they can, so as to make all the witnesses speak the truth; try to harmonize the evidence so as to make all the witnesses speak the truth. If you cannot do that, and there appears to be an irreconcilable conflict in the evidence here—and such seems to be the case, but that is for you to decide—you must determine which witness and what part of the evidence you will believe. Take the witnesses as they present themselves to you on the stand, take what they say and how they say it, their relation to the transaction about which they testify, the interest or lack of interest they have in the case and the motive or lack of motive which they may have for misrepresenting the facts—take it all and then determine which of the witnesses and what part of the testimony you will believe.

77 The jury should be satisfied in this case, as in all criminal cases, of the guilt of the defendant beyond a reasonable doubt. By reasonable doubt I do not mean a bare possibility of innocence, but a reasonable doubt as the law expresses it; a doubt founded in reason and arising from the evidence in the case *of* from the insufficiency of the evidence, and if, under all the evidence, you have such a reasonable doubt of the guilt of the defendant he should have the benefit of it and you ought to acquit him.

I call your attention again, gentlemen, that there may be no mistake about it, to the two counts in this indictment. If the jury should reach a conclusion and you have any question about how

your verdict should be framed, and I don't think you can, you had better bring a statement of it to the court after you have agreed upon it. If you find him guilty under the first count and not under the second count, so express it. If you find him guilty under the second count and not under the first, so express it. If you find him guilty under both, say: "We, the jury, find the defendant guilty." If you don't find him guilty under either, say: "We, the jury, find the defendant not guilty."

Take the case, gentlemen, and make your verdict.

To the following part of said charge: "Now, the defence here is that the amount of the check received from Mr. Rule, the pension agent, really went into the possession of the pensioner in this case, and the contention for the Government is that, under the facts of the case, the money did not really go into her possession in
78 contemplation of the law, and they also contend that the attorney, the defendant in this case, could not withhold the money or any part of it by getting the check which is in evidence here for eighteen hundred and odd dollars.

Upon that branch of the case I instruct you this: If you believe that receipt of the pension check under all the circumstances connected with it and the possession of the pension check by the defendant in this case and the taking of the check to the bank and his accompanying the pensioner to the bank, the turning of the check into cash and the payment of the money to her, the physical possession placed in her by putting the money in her hat, the redeposit of the money in the bank, and the taking of the pensioner to the office of the defendant and the drawing of the check for eighteen hundred dollars—if you believe that this was all one transaction, arranged and designed by the defendant in this case for the purpose of getting into his possession eighteen hundred dollars of the money which the pensioner received; that it was a scheme designed by him, one continuous transaction for that purpose, and that he was a party to it and was the beneficiary of the money received, then that would be in law withholding of the money under this statute, and the defendant would be guilty, and it would be your duty to convict him; but it would be necessary for you to believe that. The other rule which I gave you is true and exists in law—that is, that the money can be paid by the attorney to the pensioner, and that thereafter there might be a transaction be-
79 tween them which, of course, could be transaction which would be entirely legal and honest, by which the cash would pass from the pensioner to the attorney, but that would depend on the character of the transaction. The jury will see the facts, and I state it to you again: that if all these facts or series of facts *or* one continuous transaction designed by the defendant and arranged by him, as contended for by the Government, for the purpose of getting into his possession eighteen hundred and odd dollars of the money of the pensioner, and that he did receive it or was the beneficiary of the receipt of it, then that would be withholding, in the meaning of the statute.

Now, the facts in this case are for the jury to determine. The checks are in evidence and you will have them with you. The check signed by the pensioner, which seems to be made to Hurley Ballew and endorsed by him, is in evidence, and you will have that out with you."

To this charge an exception was then and there taken and duly noted by the court.

The jury, after being charged, retired and returned the following verdict: "We, the jury, find the defendant guilty;" which verdict was signed by the foreman.

I certify that the foregoing bill of exceptions is true and contains all evidence material to a clear understanding of the errors complained of. The clerk of this court will enter the same on record and transmit the same, with the full transcript of record in this case, to the Supreme Court of the United States, in order that the
80 errors complained of may be corrected. The exceptions hereinbefore contained were duly made in open court during the trial of the above-stated case, and were then and there noted by the court, and this certificate is given *nunc pro tunc* during the term of the court the trial was had.

This February 12th, 1895.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office Feb'y 12, 1895.

W. C. CARTER,
Deputy Clerk.

Service of the within bill of exceptions acknowledged; copy, notice, and all other and further notice waived. Feb'y 12th, 1895.

J. S. JAMES,
U. S. Att'y.
T. W. RUCKER,
Ass't U. S. Att'y.

Assignment of Errors.

UNITED STATES OF AMERICA
vs.
A. W. BALLEW.

And now comes A. W. Ballew and assigns error upon each of the exceptions taken upon the trial of the above-stated case as follows:

1. That the court erred in admitting in evidence the transcript of the record from the Department of the Interior because not properly authenticated as coming from the department, as required by the statute. That is not a transcript of any record or document
81 on file in the office of the Secretary of the Interior. To the admission of which transcript the defendant objected, and the objection *being* overruled and an exception was then and there taken and duly noted by the court.

2. Because the court erred in failing to direct a verdict of not guilty for the defendant on the conclusion of the Government's evidence; to which ruling defendant then and there entered an exception, and it was duly noted by the court.

3. Because the court erred in excluding from the jury the testimony of J. B. Chamblee, as follows:

Q. In that conversation with A. W. Ballew, the defendant here, what did he say was the basis of that money given to Hurley Ballew?

A. What did A. W. Ballew say he done as a matter of inducement to her?

—. Yes.

A. I do not know anything, only that he prosecuted this pension claim; as to what he had to do with Hurley, I don't know that he ever said anything. I think he tol- me that he got his fee from the Pension Department as attorney.

Q. That is all he ever got?

A. That is all he got, I think he told me.

Q. That he got this fee from the Pension Department?

A. That is all he ever got.

Mr. RUCKER: What were you trying to prove, Ballew's declaration?

Mr. GLENN: Yes, sir.

(The COURT:) You need not consider that, gentlemen of the jury.

82 Mr. GLENN: I was asking him about a conversation that Ballew had with him as to the consideration of this check, and I want to prove all that Mr. Ballew said in this same conversation.

(The COURT:) It is ruled out. You need not consider it, gentlemen of the jury.

To the exclusion of this testimony an exception was then and there taken and duly noted by the court. Counsel for the defendant contended that it was part of a conversation which had been drawn out by counsel for the Government in the cross-examination of J. B. Chamblee, and that they were entitled to prove all which was said. The court, however, excluded the testimony and withdrew from the jury all that Chamblee swore as to Ballew's statement above set out; which ruling is now assigned as error; to which ruling an exception was then and there duly taken and noted by the court.

4. Because the court erred in declining to charge, as requested by defendant's counsel, as follows: "When a pension check is delivered to a pensioner and she takes the same to a bank and has it cashed and then deposits the said fund in a bank and takes a deposit slip therefor, the funds loses its nature and character as pension money, and the ordinary relation of debtor and creditor exists between the pensioner and the bank, and if thereafter by any device or in any way whatever the pensioner's attorney obtains a draft from her and

draws it out of her general account he cannot be convicted of
83 withholding under the 5485 section of the Revised Statutes,
and it would be your duty to acquit him on that count, if these be the facts as to that branch of the case."

This charge was refused by the court and an exception was then and there taken and duly noted, and said refusal is now assigned as error.

5. Because the court erred in charging the jury as follows: "Now, the defense here is that the amount of the check received from Mr. Rule, the pension agent, really went into the possession of the pensioner in this case, and the contention for the Government is that under the facts of the case the money did not really go into her possession in contemplation of the law, and they also contend that the attorney, the defense in this case, could not withhold the money or any part of it by getting the check which is in evidence here for eighteen hundred and odd dollars.

Upon that branch of the case I instruct you this: If you believe that the receipt of the pension check under all the circumstances connected with it and the possession of the pension check by the defendant in this case and the taking of the check to the bank and his accompanying the pensioner to the bank, the turning of the check into cash, and the payment of the money to her, the physi-al possession placed in her by putting the money in her hat, the redeposit of the money in the bank, and the taking of the pensioner to the office of the defendant and the drawing of the check for eighteen hundred dollars—if you believe that this was all one transaction arranged and designed by the defendant in this case for
the purpose of getting into his possession eighteen hundred
84 dollars of the money which the pensioner received; that
it was a scheme designed by him, one continuous transaction, for that purpose, and that he was a party to it and was the beneficiary of the money received, then that would be in law a withholding of the money under this statute, and the defendant would be guilty and it would be your duty to convict him, but it would be necessary for you to believe that. The other rule which I gave you is true and exist- in law—that is, that the money can be paid by their attorney to the pensioner, and thereafter there might be a transaction between them, which, of course, could be transactions which would be entirely legal and honest, by which the cash could pass from the pensioner to the attorney, but that would depend on the character of the transaction. The jury will see the facts, and I state it to you again: that if all these facts *are* series of facts are one continuous transaction designed by the defendant and arranged by him, as contended for by the Government, for the purpose of getting into his possession eighteen hundred and odd dollars of the money of the pensioner, and that he did receive it or was the beneficiary of the receipt of it, then that would be withholding in the meaning of the statute. Now, the facts in this case are for the jury to determine. The check signed by the pensioner, which seems to be made to Hurley Ballew and endorsed by him, is in evidence, and you will have that out with you.

To this charge an exception was then and there taken and duly noted by the court, and the same is now assigned as error.

85 W. C. GLENN,
C. D. MADDOX,
Counsel for A. W. Ballew.

Filed in clerk's office Feb'y 12, 1895.

W. C. CARTER,
Deputy Clerk.

86 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Georgia, wherein A. W. Ballew is plaintiff in error and you are defendant in error, to show cause, if any there be, why the verdict & judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

WM. T. NEWMAN,
U. S. Judge.

Service.

Due and legal service of the within citation and writ of error in case of United States *vs.* A. W. Ballew is hereby acknowledged and all other and further service waived.

Feb'y 12, 1895.

J. S. JAMES, *U. S. Att'y.*
T. W. RUCKER,
Ass't U. S. Att'y.

87 Know all men by these presents that we, A. W. Ballew, as principal, and J. M. Ballew, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred & fifty dollars, to be paid to the said United States of America, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a regular term of the circuit court of the United

States for the northern district of Ga., in a suit depending in said court between The United States of America and A. W. Ballew, a verdict & judgment was rendered against the said A. W. Bellew, and the said A. W. Bellew having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the verdict & judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said A. W. Ballew shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

A. W. BALLEW, *Prin.* [SEAL.]
J. M. BALLEW, *Sur'y.* [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—
A. W. BALLEW.

Signed in presence of—

JOHN P. DAVIS, *Ordinary.*

Floyd Co., Ga., Feb'y 14, 1895.

SINCLAIR MIMS,
Gordon County Clk, &c.

Approved by—
WM. T. NEWMAN,
U. S. Judge.

88 UNITED STATES OF AMERICA, } 88:
Northern District of Georgia, }

I, Olin C. Fuller, clerk of the circuit court of the United States of America for the northern district of Georgia, in the fifth circuit, do hereby certify that the foregoing pages, numbered from 1 to 87, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The United States against A. W. Ballew as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Atlanta, Ga., in the northern district of Georgia, in the fifth circuit, this second day of March, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

Seal U. S. Circuit Court, N. D. Georgia.

OLIN C. FULLER, *Clerk.*

89 Supreme Court of the United States of America, Oct. Term, 1894.

A. W. BALLEW, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on Tuesday, the 12th of March, 1895, at the October term, 1894, of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said A. W. Ballew, by W. C. Glenn and D. W. Rountree, his attorneys, and says that on the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

I.

That the court erred in admitting in evidence the transcript of the record from the Department of the Interior because not properly authenticated as coming from the department, as required by statute; that it is not a transcript of any record or document on file in the office of the Secretary of the Interior; to the admission of which transcript the defendant objected, and the objection being overruled *and* an exception was then and there taken and duly noted by the court.

II.

Because the court erred in failing to direct a verdict of not guilty for the defendant on the conclusion of the Government's evidence; to which ruling the defendant then and there entered an exception and it was duly noted by the court.

III.

Because the court erred in excluding from the jury the testimony of J. B. Chamblee as follows:

Q. In that conversation with A. W. Ballew, the defendant here, what did he say was the basis of that money given Hurley Ballew?
A. What did A. W. Ballew say he done as an inducement to her?
—. Yes.
A. I do not know anything, only that he prosecuted that
90 pension claim. As to what he had to do with Hurley, I don't know that he ever said anything. I think he told me that he got his fee from the Pension Department as attorney.
Q. That is all he ever got?
A. That is all he got I think he told me.
Q. That he got this fee from the Pension Department?
A. That is all he ever got.

Mr. RUCKER: What were you trying to prove—Ballew's declaration?

Mr. GLENN: Yes, sir.

(The COURT:) You need not consider that, gentlemen of the jury.

Mr. GLENN: I was asking him about a conversation that Ballew had with him as to the consideration of this check, and I want to prove all that Mr. Ballew said in this same conversation.

(The COURT:) It is ruled out; you need not consider it, gentlemen of the jury.

To the exclusion of this testimony an exception was then and there taken and duly noted by the court. Counsel for the defendant contended that it was part of a conversation which had been drawn out by counsel for the Government in the cross-examination of J. B. Chamblee, and that they were entitled to prove all which was said. The court, however, excluded the testimony, and withdrew from the jury all that Chamblee swore as to Ballew's statement above set out, which ruling is now assigned as error; to which ruling an exception was then and there duly taken and noted by the court.

IV.

Because the court erred in declining to charge, as requested by defendant's counsel, as follows: "When a pension check is delivered to a pensioner and she takes the same to a bank and has it cashed and then deposits the said fund in a bank and takes a deposit slip therefor the fund loses its nature and character as
91 pension money and the ordinary relation of debtor and creditor exists between the pensioner and the bank, and thereafter if by any device or in any way whatever the pensioner's attorney obtains a draft from her and draws it out of her general account he cannot be convicted of withholding under the 5485 section of the Revised Statutes, and it would be your duty to acquit him on that count, if these be the facts as to that branch of the case."

This charge was refused by the court and an exception was then and there taken and duly noted, and said refusal is now assigned as error.

V.

Because the court erred in charging the jury as follows: "Now, the defense here is that the amount of the check received from Mr. Rule, the pension agent, really went into the possession of the pensioner in this case, and the contention for the Government is that under the facts of the case the money really did not go into her possession in contemplation of law; and they also contend that the attorney, the defendant in this case, could not withhold the money or any part of it by getting the check, which is in evidence here, for eighteen hundred and odd dollars.

Upon that branch of the case I instruct you this: If you believe that the receipt of the pension check under all the circumstances connected with it and the possession of the pension check by the defendant in this case and the taking of the check to the bank and

his accompanying the pensioner to the bank, the turning of the check into cash and the payment of money to her, the physical possession placed in her by putting the money in her hat, the redeposit of the money in the bank, and the taking of the pensioner to the office of the defendant and the drawing of the check for eighteen hundred dollars—if you believe that this was all one trans-
92 action arranged and designed by the defendant in this case for the purpose of getting into his possession eighteen hundred dollars of the money which the pensioner received; that it was a scheme designed by him—one continuous transaction—for that purpose, and that he was a party to it and was the beneficiary of the money received, then that would be in law a withholding of the money under this statute, and the defendant would be guilty and it would be your duty to convict him; but it would be necessary for you to believe that. The other rule which I gave you is true and exists in law—that is, that the money can be paid by their attorney to the pensioner and thereafter there might be a transaction between them, which, of course, would be entirely legal and honest, by which the cash could pass from the pensioner to the attorney, but that would depend on the character of the transaction. The jury will see the facts, and I state it to you again: that if all these facts or series of facts are one continuous transaction designed by the defendant and arranged by him, as contended for by the Government, for the purpose of getting into his possession eighteen hundred and odd dollars of the money of the pensioner, and that he did receive it or was the beneficiary of the receipt of it, then that would be withholding in the meaning of the statute. Now, the facts in this case are for the jury to determine. The check signed by the pensioner, which seems to be made to Hurley Ballew and endorsed by him, is in evidence and you will have that out with you."

To this charge an exception was then and there taken and duly noted by the court, and the same is now assigned as error.

Wherefore the said A. W. Ballew prays that the judgment of the said circuit court of the United States for the northern district of Georgia be reversed, and that a *venire facias de novo* be awarded and
such other and further proceedings be had in this court and
93 such order and direction be given to the said circuit court as may be proper in the premises.

W. C. GLENN,
D. W. ROU-TREE,
Attorneys for Plaintiff in Error,
Gate City National Bank Building, Atlanta, Ga.

Filed in clerk's office 12 day of Feb'y, 1895.
O. C. FULLER, *Clerk,*
By J. D. STEWARD, *Deputy.*

Endorsed on cover: Case No. 15,817. N. Georgia C. C. U. S. Term No., 933. A. W. Ballew, plaintiff in error, *vs.* The United States. Filed March 6th, 1895.

Supreme Court U.S.
FILED.
APR 13 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

A. W. BALLEW, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 933.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

A. W. BALLEW, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 933.

MOTION TO ADVANCE.

This is an indictment for charging a larger fee than that allowed by law for collecting a pension, and also for withholding the pension collected, in violation of sections 5485, 4785, and 4786 of the Revised Statutes. The plaintiff in error was sentenced to imprisonment for two years. He was admitted to bail in the sum of $5,000 on February 1, 1895.

The Solicitor-General respectfully moves the court to advance the case upon the docket and set it down for hearing at such early day during the next term as may be convenient to the court.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

15533

Office Supreme Court U. S.
FILED.
OCT 14 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 547

A. W. BALLEW, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 933.

A. W. BALLEW, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The plaintiff in error was, on the 3rd day of November, 1893, indicted in the Circuit Court of the United States for the Northern District of Georgia. The indictment contains two counts. The first count charges that he was the agent and attorney for a pensioner, Lucy Burrell. That the pension was collected and deposited in a bank, and that the pensioner was induced to put her name to a check for the sum of $1,887.34, "upon the presumption and under the idea, as she was informed, that it was for $25.00, payable to her son, Charley Burrell, to enable him to visit his sick sister in Chattanooga, when in truth and in fact, the said A. W. Ballew, for the purpose of withholding from her, and defrauding her of her money, had drawn the aforesaid check for $1,887.34 payable to his son, Hurley Ballew, and the said A. W. Ballew got his son to endorse the check and he, the said A. W. Ballew, received the money thereon, and wrongfully and fraudulently did then and there convert it to his own use." The offense charged in this count is withholding pension money from a pensioner.

The second count charges that the plaintiff in error demanded, received and retained for the service in collecting the pension for Lucy Burrell, the sum of $75.00, contrary to the form of the statute, etc.

The trial of the case began on the 22nd day of October, 1894, and on the 24th the jury returned a verdict finding the defendant guilty generally.

Subsequently a motion for a new trial was made upon various grounds and the same being afterwards overruled on the 12th of February 1895, this writ of error was sued out.

ASSIGNMENTS OF ERROR.

Five errors are assigned in the trial of the case.

I.

The first one is that the Government introduced in evidence a certificate from the Department of the Interior, its object and purpose being to prove the pension status of Lucy Burrell. To the introduction of this certificate the counsel for the defendant objected; first, because it was not properly authenticated as coming from the Department, and that it is not a transcript of any record or document on file in the office of the Secretary of the Interior. The objection was overruled and exception taken. The certificates, the ruling and the exception will be found on pages 6, 7 and 8 of the printed record.

II.

Upon the conclusion of the testimony for the Government, counsel for the defendant moved the court to direct a verdict on the first count of the indictment upon the ground that the same had not been made out, money having passed from the control and custody of the government into that of the pensioner, and upon the ground that from that time forward it was under the protection of the laws of the State, and that the crime made out was an ordinary one of cheating and swindling and no violation of the pension laws.

The motion, the ruling and the exception will be found on page 22 of the printed record.

III.

Upon the trial, the defendant introduced as a witness, one J. B. Chamblee. Chamblee was cross examined by Mr. Rucker, the assistant District Attorney. In the cross examination Chamblee was asked about a conversation between the plaintiff in error and himself concerning the $1,800.00 check, and the following testimony was drawn out: (printed record, page 26.)

"After Mr. Fitzpatrick came around there he asked me what I knew about the situation. Mr. Ballew asked me if I had been interviewed

by Mr. Fitzpatrick, and I told him, yes. He questioned me about this $1,800 00 check. I told him it was about the house and lot, and Mr. Ballew then told me that she gave it to Hurley."

Upon re-direct examination by counsel for the plaintiff in error it was proposed to prove all of the conversation, and the following occurred:

"Q. In that conversation with A. W. Ballew, the defendant here, what did he say was the basis of that money given to Hurley Ballew?

A. What did A. W. Ballew say he done as a matter of inducement to her?

Q. Yes.

A. I do not know anything only that he prosecuted this pension claim, and as to what he had to do with Hurley I do not know that he ever said anything. I think he told me he got his fee from the pension department as attorney.

Q. That is all he ever got?

A. That is all he got I think he told me.

Q. That he got his fee from the pension department?

A. That is all he ever got.

MR. RUCKER: What are you trying to prove, Ballew's declaration?

MR. GLENN: Yes, sir.

THE COURT: You need not consider that, gentlemen of the jury.

MR. GLENN: I was asking him about the conversation Ballew had with him as to the consideration of this check and I want to prove all that Ballew said in this same conversation.

THE COURT: It is ruled out, you need not consider it, gentlemen."

Counsel for the defendant contended that it being a part of the conversation which had been drawn out by the counsel for the government in the cross-examination of Chamblee, that he was entitled to prove all that was said in that conversation.

The cross-examination by Mr. Rucker, the re-direct examination by Mr. Glenn, the ruling of the court, and the exception to the ruling will be found on pages 25, 26 and 27 of the printed record.

IV.

The next error alleged is the refusal of the court to give a charge. The testimony in the case showed that the check had come into Ballew's possession; that it was taken by the pensioner to a bank in the city of Rome; that the bank cashed it and paid the money to the pensioner; that the pensioner then deposited the fund in the bank and took an ordinary deposit slip therefore, and thereafter, in the office of A. W. Ballew, the $1,800.00 check was drawn.

As charged in the indictment, the government undertook to show that the check was procured by a representation that it was for only $25.00. The defendant undertook to show that the pensioner was fully informed of the amount and purpose of the $1,800.00 check, and that the same was cashed by Hurley Ballew, the son of the defendant, and that it went into the business of the said Hurley Ballew, and that the delendant received no profit from it whatever.

Upon conclusion of the evidence the court was requested at the proper time and place to charge as follows: "When a pension check is-delivered to a pensioner and she takes the same to a bank and has it cashed and then deposits the said fund in the bank and takes a deposit slip therefor, the fund loses its nature and character as pension money and the ordinary relation of the debtor and creditor exists between the pensioner and the bank, and thereafter if any device or in any way whatever the pensioner's attorney obtains a draft from her and draws it out of her general account he cannot be convicted of withholding under the 5485th Section of the Revised Statutes, and it would be your duty to acquit him on that count if these be the facts as to that branch of the case.

The request, refusal and the exception will be found on page 38.

V.

The last assignment is to a charge of the court. As stated in the above specification of error, there were two theories before the jury, and the court charged the jury as follows:

"Now, the defense here is that the amount of the check received from Mr. Rule, the pension agent, really went into the possession of the pensioner in this case, and the contention for the Government is that under the facts of the case the money did not really go into her possession in contemplation of the law, and they also contend that the attorney, the defendant in this case, could not withhold the money or any part of it by getting the check which is in evidence here for eighteen hundred and odd dollars.

Upon that branch of the case I instruct you this: if you believe that the receipt of the pension check under all the circumstances connected with it and the possession of the pension check by the defendant in this case and the taking of the check to the bank and his accompanying the pensioner to the bank, the turning of the check into cash, and the payment of the money to her, the physical possession placed in her by putting the money in her hat, the re-deposit of the money in the bank and the taking of the pensioner to the office of the defendant and the drawing of the check for eighteen hundred dollars—if you believe that this was all one transaction arranged and designed by the defendant in this case for the purpose of getting into his possession eighteen hundred dollars of the money which the pensioner received; that it was a scheme designed by him, one continuous transaction, for that purpose, and that he was a party to it and was the beneficiary of the money received, then that would be in law withholding of the money under this statute, and the defendant would be guilty and it would be your duty to convict him, but it would be necessary for you to believe that. The other rule which I gave you is true and exists in law—that is, that the money can be paid by the attorney to the pensioner, and that thereafter there might be a transaction between them, which of course, could be transaction which would be entirely legal and honest, by which the cash would pass from the pensioner to the attorney, but that would depend on the character of the transaction. The jury will see the facts, and I state it to you again: that if all these facts are series of facts or one

continuous transaction designed by the defendant and arranged by him, as contended for by the government, for the purpose of getting into his possession eighteen hundred and odd dollars of the money of the pensioner, and that he did receive it or was the beneficiarier of the receipt of it, then that would be withholding in the meaning of the statute. Now, the facts in this case are for the jury to determine. The checks are in evidence and you will have them with you. The check signed by the pensioner, which seems to be made to Hurley Ballew and endorsed by him, is in evidence, and you will have that out with you."

The charge of the court which is excepted to, together with the exception, will be found on pages 42-43 of the printed record.

ARGUMENT.

1 *First Assignment of Error.*

It will be observed that certificate to the accompanying page as well as the certificate following the paper is signed by the Commissioner Pensions.

The only certificate under the seal of the department is signed by the acting Secretary of the Interior and refers only to the official character of the Commissioner of Pensions and the faith and credit to which his attestations are entitled.

It is submitted that the copy was improperly authenticated and ought not to have been admitted in evidence.

Rev. Stats., Section 882.

Second and Fourth Assigments of Error.

We contend that the deposit of money in the bank by the pensioner, under the circumstances, became a general deposit, the pensioner parting with her title to the money and thereby the relation of debtor and creditor existed between the bank and the pensioner, and the bank agreeing to pay said debt by returning the same amount or any part thereof on demand. The money became the property of the depository and the depositor's claim was a mere chose in action.

It is impressed with no trust in favor of the depositor, and there is no relation of the cestui que trust between her and the banker.

2 Marine Bank vs. Fulton, 2 Wall. 256.

Bank of the Republic vs. Millard, 10 Wall. 152.

Vide, also Jones on Bailments, 102.

Story on Bailments, Section 88.

Bank vs. Rushmore, 28 Ill. 463.

Ætna Nat. Bank vs. 4th Nat. Bank, 46 N. Y. 82.

If the evidence submitted by the government is true, the defendant, if guilty of any offense, is only guilty of the crime of cheating and swindling under the laws of the State of Georgia.

Code of Ga. of 1882, Section 4595.
93 Ga. R. 552
90 Ibid, 441.
77 Ibid, 515, 776.
58 Ibid, 408.

It is submitted that the defendant should have been discharged on motion.

Third Assignment of Error.

The proposition that where the government introduced in evidence a part of a confession or an admission of a party to a cause made in the course of a conversation with a witness, the defendant has the right to lay before the Court the entire conversation, is sustained by an unbroken current of authorities.

3 In criminal as well as in civil cases the whole of an admission made by a party is to be given in evidence:

Greenleaf's Ev. (15th ed.) Sec. 218.
Roscoe's Crim. Ev. (10th ed.) 54.
Comer vs. State. 34 Tex. 659.
State vs. Hollanscheit, 61 Mo. 302.
State vs. Marten, 28 Mo. 530.
Griswold vs. State, 24 Wis. 144.
State vs. Elliott, 15 Ia. 72.
Peterson vs. State, 47 Ga. 524, (3.)
Long vs. State, 22 Ga. 40, (7.)
Alfred vs. State, 37 Miss. 296.
Green vs. State, 13 Mo. 382.
Bower vs. State, 5 Mo. 346.
Williams vs. State, 39 Ala. 532.
Corbett vs. State, 31 Ala. 42.
Chambers vs. State, 26 Ala. 59.
Frank vs. State, 27 Ala. 37.
State vs. Mahon, 32 Vt. 241.
State vs. McDonnell, 32 Vt. 491.
Kelsey vs. Bush, 2 Hill. (N. Y.) 440.
People vs. Johnson, 2 Wheel. (C. C.) N. Y. 337.
Com. vs. Keyers, 11 Gray (Mass) 323.
Com. vs. Brown, 9 Leigh (Va.) 633.
State vs. Worthington, 64 N. C. 594.
Crawford vs. State, 4 Cald. (Tenn.) 190.
Tipon vs. State, Peck (Tenn.) 308.
State vs. Isaac, 3 La. Ann. 359.
4 People vs. Navis, 3 Cal. 106
People vs. Murphy, 3 Cal. 52.
People vs. Galabert, 39 Cal. 663.
Republic vs. McCartney, 2 Dall. C. C. 86.
U. S. vs. Prior, 5 Cranch, C. C. 37.
U. S. vs. Wilson, 1 Baldw. 78.

The rule is thus laid down by Abbot, C. J., and reported in 2 Brad. and Bing. 297: "If on the part of the prosecution a confession or admission of the defendant made in the course of a conversation with the witness be brought forward, the defendant has a right to lay before the court the whole of what was said in that conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the matter introduced on the previous examination, provided only that it relates to the subject matter of the suit, because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what was said on the same occasion."

"There is no doubt," says Mr. Justice Bosanquet, "that if a prosecutor uses a declaration of a prisoner he must take the whole of it together and cannot take one part and leave another."

Rex vs. Jones, 2 C. & P. 629.

Where a prisoner was indicted for larceny and in addition to the evidence of possession of goods, the counsel for the prosecution put in the prisoner's statement before the magistrate in which he said he had bought the goods, Garrow, B., is reported to have directed an acquittal, saying if a prosecutor used a prisoner's statement he must take the whole of it together."

Rex vs. Wiggins, 3 C. & P. 603.

Where the prosecution proved declarations and conversations of the accused, he has a right, on cross examination, to question the witnesses as to all he said at the time and has a right to call on his defense witnesses to prove all that he said at the time

People vs. Strong, 30 Cal. 151.
Comer vs. State, 34 Tex. 659.
State vs. Worthington, 64 N. C. 594.

Where the prosecution have proved declarations of the prisoner by a witness who states that he did not hear all that the prisoner said at the time, the prisoner has a right to prove by other witnesses who were present, all he said at the time tending to exhonorate himself.

Coffman vs. Com., 10 Bush (Ky.) 495.

A question may be put upon re-examination, which may have some bearing on the case, and which but follows out the questions put on cross examination.

Taylor vs. U. S., 3 Howard, 208.

6 *Fourth and Fifth Assignment of Error.*

Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law and may be corrected in an appellate court.

Wash. & G. R. R. Co. vs. Varnell, 98 U. S., 485.
Edwards vs. Darby, 12 Wheat. 212.
Loring vs. Frue, 104 U. S. 223.

The fair test of the propriety of a charge cannot be whether on the abstract it is right. It must be taken in view of the evidence, of the facts charged on which to the jury is to respond. A charge in the abstract as a mere legal proposition might be perfectly inoperative and harmless, when, however, referred to a certain set of facts and circumstances in the proof, it might have a most important and conclusive influence on the jury in forming their verdict.

Lipscomb, J., in Thompson vs. Shannon, 9 Tex. Tex. 536.
Falvey vs. State, 85 Ga. 157.

It is error for the judge to submit to the jury a fact or state of facts which there is no evidence tending to prove, or to give instructions with reference to a state of facts not in evidence.

Wakefield vs. Smithwick, 4 Jones L. (N. C.) 327.
Gilchrist vs. Rogers, 6 W. & S. (Pa.) 488.
Herdic vs. Bigler, 47 Pa. St. 60.
Kelsoe vs. Townsend, 13 Tex. 140.
Bogle vs. Kreitzer, 46 Pa. st. 465.

7 Starwell vs. Wilcox, 17 Vt. 176.
Switland vs. Holgate, 8 Watts (Pa.) 385.
Sutton vs. Nadre, 2 Jones & L. (N. C.) 320.
Cobb vs. Fugelamn, Iredell & L. (N. C.) 444.
Bond vs. Hall, 8 Jones & L. (N. C.) 14.
Webster Coll. vs. Iredell, 35 Mo. 268.
Jeffersonville C. Co. vs. Swift, 26 Ind. 459.
Dickerson vs. Johnson, 24 Ark. 251.
Cothran vs. State, 39 Miss. 541.
Herndon vs. Bryant, 39 Miss. 336.
Olive vs. State, 39 Miss. 526.
Galana, etc. R. R. Co., vs. Jacobs, 20 Ill. 487.
Swank vs. Nichols, 24 Ind. 119.
Hicks vs. U. S., 150 U. S. 442.
Starr vs. U. S. 153 U. S. 624, 625, and cases cited.

Generally on the motion.

If upon any one issue error was committed, either in the admission of evidence or in the charge of the Court, a general verdict upon several issues cannot be upheld.

Maryland vs. Baldwin, 112 U. S. 490
Commonwealth vs. Boston & Maine R. R., 133 Mass. 383, 392.
Wood vs. State, 59 N. Y., 117, 122.

W. C. GLENN,
DAN'L. W. ROUNTREE,
Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

A. W. BALLEW, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 547.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR DEFENDANT IN ERROR.

A. W. Ballew (indicated by initials because his "further given name is to the jurors unknown") was indicted upon two counts: First, for withholding pension moneys, and, second, for demanding, receiving, and retaining, as pension attorney, a larger amount than that allowed by law. The crimes were both alleged to have been committed September 5, 1892. They were, however, entirely separate and distinct. He was tried before Judge Newman and a jury, and convicted October 24, 1894.

The errors alleged relate entirely to the first count. Ballew's conviction was under § 4786 of the Revised Statutes, as amended by the pension appropriation act of July 4, 1884, chapter 181, § 4 (Rev. St. Supp., p. 453). The final paragraph of the section as thus amended supersedes § 5485 of the Revised Statutes, which it almost literally reenacts. The crime is described as follows in this section:

> Any agent or attorney, or other person instrumental in prosecuting any claim for pension or bounty land, who shall, directly or indirectly, contract for, demand or receive or retain any greater compensation for his services or instrumentality * * * than is herein provided * * * *or who shall wrongfully withhold* from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, * * * shall be deemed guilty of a misdemeanor, etc.

No criticism is made upon the form of the indictment.

STATEMENT OF FACTS.

The evidence in this case is very conflicting. Not only is there a complete conflict of testimony between the Government's witnesses and those of the defendant, but there is some discrepancy between the Government's witnesses themselves. The charge of the court, so far as discussed in the bill of exceptions, and the verdict of the jury, were based upon the testimony of the pensioner, an illiterate old colored woman named Lucy Burrell.

It is undisputed that Mrs. Burrell was a United States pensioner, being the widow of a colored soldier who died

in the war. Her pension was obtained for her by the defendant, A. W. Ballew. It is undisputed that a Government check for $3,774.34, to the order of this pensioner, was indorsed by her (by making her mark) in the Merchants' National Bank of Rome, Ga., on September 5, 1892; that the money was thereupon paid over to her in the bank, and put in her hat in the presence of the president of the bank and of A. W. Ballew; that she immediately redeposited the money in the bank, and that on the same day and probably within an hour, her check for $1,887.34, payable to Hurley Ballew, son of A. W. Ballew, was presented at the bank and paid. The indictment charges that she was persuaded to leave the money in the bank, and that to this check "the pensioner put her mark, upon the presumption and under the idea, as she was informed, that it was for twenty-five dollars payable to her son, Charley Burrell, to enable him to visit his sick sister in Chattanooga." Whereas "said A. W. Ballew got his son to endorse said check, and he, the said A. W. Ballew, received the money thereon and wrongfully and fraudulently did then and there convert the said eighteen hundred and eighty-seven dollars and thirty-four cents to his own use," and "did then and there unlawfully and wrongfully withhold and refuse to pay and continues to withhold from and refuses to pay" the said pension.

Mrs. Burrell's testimony is to be found at pages 12 to 18 of the record. She says that when Mr. Ballew received the check (which was made to her own order, according to the practice of the Government), he sent for her to come

to his office, and told her that they would go down to Mr. King's (Mr. King being the president of the bank) and get the money. She proceeded as follows:

> I think that perhaps in his office he says to me, "When you get this money you just return it back to him again." I thought he was doing right, and after he gave me the money I put it in my old hat and carried it around to the window and returned it back to him again. He told me to give it back to Mr. King, and not to bring it out. He didn't tell me anything more; then follow me around to see where I put it. He told me one time not to bring it out, but just to return it to the bank again. When I got the money I went around to the window and emptied my old hat out on the place, and emptied all out but ten cents, and he said, "You haven't got it all;" and I shuck my hat and this ten cents fell out, and I handed it to him. Then I left the bank. I can not read or write. After I got through with the money I went back to Mr. Ballew's office and got him to write for this boy $20—that is, for Quintard [her son]. He sent for Mr. Chamblee after I got up there. He was sitting down at the table writing. I don't know whether he wrote it or whether Mr. Chamblee wrote it. I did tell Mr. Ballew what check to draw that first day after I went back to the bank—a check for Quintard, to give him $25. * * * * (pp. 12, 13).
>
> Did not have any idea that that check on that Monday was for $1,800; did not know that I was giving him or giving Hurley Ballew that much money; did not agree to give him any money; did not have any idea of the quantity until my daughter told me. * * * * (p. 13.)
>
> When this check for $1,800 was written I don't know, because there are very few men in the town

> that I know any more than I do here. I don't know who was in there. I understood I was getting a check for $20. If I gave a check for any more than that, they tolled me into it. They took charge of my ignorance; I could not read and they fooled me into it. * * * Mr. A. W. Ballew wrote that check and wrote the check that I gave to my son. * * * After he wrote it, he told me what it was for, and told me to put my name to it, and, supposing it was all right, put my mark to it. I reckon I made my mark to a heap of things when I didn't know it (p. 16).

Her daughter, Clarrisse Burrell, testified that when she discovered that her mother had parted with so much money she demanded an explanation from A. W. Ballew. She said:

> I will just tell you what happened about the balance. He says, "I had to go to Washington before the bill was put through for that money in order to get it, and there was myself and two other gentlemen." One of the gentlemen was in Washington, and I think he said he took the other one from Atlanta. He says, "You know it took a great deal of expense to take me there;" and he says he had to bring these other gentlemen to help him get the bill through Congress. He said this other money that he had not accounted for was spent in getting this bill through Congress. That was all. Then I left him there and went home. I think he said he carried one man from Atlanta and the other one was in Washington; that the one in Washington was a Member of the House. He said he was in a house of a friend of his, and that he spent this money, and did not pay my mother to get the bill through Congress (pp. 19–20).

J. F. Fitzpatrick, a United States special examiner of pensions, testified that A. W. Ballew admitted that the money collected by his son Hurley belonged to himself.

> I asked him what about his son in this matter, and he said his son did not have anything to do with it; that he got this money, this $1,887. * * * He said he got it himself; that his son was not in it. He said that he was the beneficiary; that his son was about to get married, and he did not want to get him into any trouble and acknowledged the whole thing (pp. 10–11).

Hurley Ballew testified that the money was paid to himself voluntarily by the old woman for services rendered by him in getting testimony. These services consisted in three trips, which he took with the old woman in search of witnesses. The trips were about 10 or 12 miles in length, and were made by driving. They do not seem to have been kept out overnight at any time. This testimony of Hurley Ballew's was, of course, substantially a confession of crime on his own part under the section above stated. (See *Frisbie* v. *United States*, 157 U. S., 160.)

ASSIGNMENTS OF ERROR.

I. A page from the records of the Pension Office, showing the issuance of Mrs. Burrell's pension, was put in evidence by defendant's counsel (pp. 6, 7), which transcript is objected and excepted to as not properly authenticated.

The objection seems to be based on an oral charge of Judge Hammond, in the western district of Tennessee,

directing a verdict for defendant for failure to prove that prosecutrix was a pensioner by what he ruled to be the best evidence, namely, whatever might be the paper on file in the Pension Bureau which constitutes one a pensioner. (*United States* v. *Scott*, 25 Fed. Rep., 470.) The learned judge was unable to find any statutory provision for such a paper, though the existence of some form of certificate in actual practice is recognized in Revised Statutes, § 4768.

It is respectfully submitted that this ruling of the learned justice was due to the prevalent though mistaken notion that a pension is established by something in the nature of a patent, or that a pensioner is placed upon the roll by some act analogous to the appointment of a public officer or the admission of an attorney to practice before a court.

No such definite act is directed by statute. A pension is not a vested right, but a periodical bounty. (*Frisbie* v. *United States*, 157 U. S., 160, 166, and cas. cit.) It is a bounty which the Commissioner is directed to pay from time to time during the continuance of the soldier's disability (Rev. St., § 4692), his widow's virtuous widowhood, or his children's early infancy (act of August 7, 1882, chap. 438), as the case may be. The Commissioner's responsibility recurs in theory on every quarter day. If the soldier's disability has ceased, or his widow remarries or loses her virtue, the payment must stop. As a matter of fact, however, there are many disabilities which can not cease, like the loss of a limb, nor can the coming of age of a child be accelerated. Nor, even in the case

of a disability which may cease, can the Commissioner be expected to investigate anew four times a year. Hence, it is an ancient practice, adopted for convenience, to issue a "pension certificate," which is treated in the Bureau as evidence of a right to draw money every quarter day until further order. The existence of this certificate was first recognized by Congress in 1870, in a merely directory provision which now appears as Revised Statutes, § 4768.

As the paper was not a contract or grant, and "the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on" (Stephen on Ev., art. 90), it is submitted that the paper was unnecessary as proof and that the check itself was the best evidence of the character of the payment.

There was plenty of other testimony, unobjected to and unobjectionable, to the effect that Mrs. Burrell's check of $3,774.34 represented pension moneys. The fact was freely admitted by A. W. Ballew himself.

It is submitted, however, that the copy is sufficient under § 882 of the Revised Statutes, which requires merely that such copies be "authenticated under the seals of such Departments." It was signed by the Commissioner of Pensions himself and attested under the seal of the Interior Department by the Acting Secretary of the Interior. (*Thompson* v. *Smith*, 2 Bond, 320; see *Catlett* v. *Pacific Ins. Co.*, 1 Paine, 594, 612; *Stephens* v. *Westwood*, 25 Ala., 716.)

II. It is claimed that the court should have directed a verdict of acquittal at the close of the Government's evidence. It is unnecessary to discuss this claim, as the exception taken was waived by putting in testimony on behalf of the defendant. (*Union Pacific Railroad Co.* v. *Daniels*, 152 U. S., 684; *Wilson* v. *Haley Live Stock Co.*, 153 U. S., 39; *Runkle* v. *Burnham*, 153 U. S., 216.)

III. It was claimed that the court erred in excluding from the jury a portion of the testimony of J. B. Chamblee to the effect that A. W. Ballew, at some subsequent time not definitely stated, claimed that the $1,800 check was paid to his son for services in prosecuting the pension claim, and that his own fee was simply what he got from the Pension Office as attorney.

This testimony was all admitted without objection, but subsequently excluded from the consideration of the jury by instruction of the court. Whether or not this instruction was proper, it is submitted that the defendant could not have been prejudiced, as this statement, admittedly made *post litem motam*, was reiterated most strongly by himself and his son in their own testimony on the trial. Whatever weight the jury might have given to statements in his own behalf, had any been made by the defendant before any controversy or question had arisen, this statement, made under circumstances at least questionable, could not possibly have had even the slight effect on the case which is sufficient to require a retrial. (*Lucas* v. *Brooks*, 18 Wall., 436, 454.)

Of course the testimony is entirely hearsay. Its admissibility was contended for solely on the ground

"that it was part of a conversation which had been drawn out by counsel for the Government in the cross-examination of J. B. Chamblee, and that they were entitled to prove all that was said" (p. 27). There had been, indeed, something said by the witness upon his cross-examination concerning a conversation with Mr. Ballew (p. 26, top). It does not appear whether this was volunteered by him or drawn out by questions of the Government counsel. Assuming defendant's contention to be correct that, when a cross-examiner draws out any portion of the conversation with the opposite party, defendant's counsel, on reexamining, has the right to bring in the whole examination, nevertheless it is submitted that the record does not affirmatively show the necessary facts upon which to found an explanation. As already stated, it does not appear that the Government counsel was responsible for Chamblee's introduction on cross-examination of his conversation with Ballew. It may, as often happens, have been a mere interjection by Chamblee himself, which counsel did not think it worth while to have formally struck out. (See 1 Greenleaf on Evidence, § 468.) "There would be no safety in putting a general question to a witness upon his cross-examination if his answer might be the means of rendering the declaration of the opposite party evidence in his own favor without being called for by his antagonist." (*Winchell* v. *Latham*, 6 Cowen, 682, 685.)

Moreover, Chamblee does not definitely state on reexamination that the conversation to which he is testifying is the same which he referred to on the cross-examination.

His counsel says: "I was asking him about *a* conversation that Ballew had with him as to the consideration of this check, and I want to prove all that Mr. Ballew said in this same conversation" (pp. 26–7). After it was ruled out counsel raised the contention that it was part of the conversation referred to in the cross-examination, but he does not establish this by asking the necessary questions of the witness.

Is it, however, a correct proposition that whenever any portion of a conversation is drawn out on the cross-examination every other portion of it is made competent upon the redirect? It is of course conceded that, if any statement repeated by the witness on cross-examination is prejudicial in the slightest degree to the party calling him, counsel on the redirect examination is entitled to draw out everything in the conversation that may in any way bear upon this remark. It will be noticed, however, that Mr. Ballew's remark, as repeated by the witness Chamblee, had been entirely favorable to himself and had left no unfavorable impression to be explained away. Referring to this $1,800 check, the witness had said:

> Mr. Ballew then told me that she gave it to Hurley (p. 26, top).

On redirect examination the witness is asked:

> What did he say was the basis of that money given to Hurley Ballew?

Witness answers as follows:

> I don't know anything, only that he prosecuted this pension claim, and as to what he had to do with Hurley, I don't know that he ever said anything.

Witness then volunteers the following statement, as given in the same conversation, although independent of the Hurley Ballew question:

> I think he told me that he got his fee from the Pension Department as attorney.
>
> Q. That is all he ever got?
>
> A. That is all he ever got, I think he told me.
>
> Q. That he got his fee from the Pension Department?
>
> A. That is all he ever got.

All this was ruled out by the court in a single ruling, and exception was taken to the whole ruling. It was not claimed by the exceptant that any portion of this conversation could be admissible if the whole were not.

It must be remembered that the question about the $1,800 check given to Hurley Ballew was not the only question before the jury. There was an entirely separate count in the indictment charging that A. W. Ballew demanded, received, and retained for his own services the sum of $74, whereas he was only entitled to $25. The last portion of the conversation ruled out by the court (and probably, as would appear by the conversation as reported at pp. 26, 27 of the record, the only part of the conversation which was in the mind of the court when the ruling was made) bears upon the second count of the indictment, whereas that portion of the conversation which came in on the cross-examination related solely to the first count of the indictment.

The question is thus squarely raised: When a man is sued upon two independent causes of action or indicted for two separate crimes, and on cross-examination of one

of his witnesses a conversation was referred to in which he declares his innocence of one of the two charges against him, does that entitle his own counsel to draw out upon reexamination other declarations of innocence relating to the other charge as made in the same conversation? It is respectfully submitted that this question should be answered in the negative, both upon principle and upon authority. (1 Greenleaf on Evidence, § 467, and cas. cit.; see also cas. cit. in note *a* to id., 15th ed., § 201.)

After full discussion in *Prince* v. *Samo* (7 A. and E., 627), the court, speaking by Lord Denman, affirmed the doctrine that a witness on redirect examination can be asked as to so much only of a conversation brought out in his cross-examination as "could in any way qualify or explain the statement as to which he had been cross-examined," saying that this had been decided in the *Queen's Case* (2 B. and B., 297).

These cases and the other earlier authorities and text-books were reviewed at length in *Rouse* v. *Whited* (25 N. Y., 170), and the rule in the Prince case approved.

In *People* v. *Beach* (87 N. Y., 508, 512), Andrews, J., said:

> When a statement forming part of a conversation is given in evidence by one party, whatever was said in the same conversation tending to explain or qualify that statement may be given in evidence by the other, but the latter can not give in evidence distinct and independent statements in the same conversation, in no way connected with the statement proved by his adversary, on the ground that he had opened the subject by his examination.

These remarks related to questions arising on a cross-examination. The objection is much stronger, of course, to similar questions on a redirect.

Nor can a statement on direct, which is absolutely adverse to the party calling the witness, as a general rule, require or justify any explanation or qualification upon cross-examination, although there may be cases where it may be justifiable to supplement the statement. (*Simmons* v. *Havens*, 101 N. Y., 427, 433.)

In *Cook* v. *State*, 4 Zab. (843, 849–850), Chancellor Green, after referring to the leading text-books and to the *Queen's Case*, says:

> The object of the rule is not to permit the party to offer his acts and declarations in his own behalf, and thus to manufacture evidence for himself, but it is solely to show the full sense and meaning of the evidence offered against him. * * * Perhaps the rule in criminal cases may be thus briefly stated. If, on the trial of an indictment, the State offers in evidence any verbal or written declaration of the defendant, or any act done by him, admitting his guilt, either expressly or by implication, or from which a jury may legitimately draw any inference prejudicial to the defendant's claim of innocence, the defendant is entitled to offer in evidence the whole of the conversation, writing, or transaction.

In Massachusetts the rule is similarly laid down. (*Commonwealth* v. *Keyes*, 11 Gray, 323, 325; *Commonwealth* v. *Goddard*, 14 Gray, 402, 404.)

Nowhere, however, it is believed, has it been ruled that a whole conversation may be admitted in evidence in order to supplement testimony favorable to the party who offers to prove the conversation.

Judge Thompson does, indeed, make a positive statement in terms broad enough to sustain defendant's contention. (1 Thompson on Trials, § 481.) His authority is *Roberts* v. *Roberts*, (85 N. C., 9). In that case one of plaintiff's witnesses, on cross-examination, testified to an admission against her interest of her deceased predecessor in title, John Roberts. On redirect examination the question was put: "What was said by John Roberts in your conversation with him?" This was excluded at the trial, and its exclusion was held error by the supreme court of the State. That court said: "The question, it is true, is very broad, and standing by itself would have been inadmissible." But it was held that the question was shown by the immediately prior occurrences to have been intended simply to draw out everything said by John Roberts that would bear on this alleged admission. The court say: "The plaintiff was entitled to all that was said in that conversation pertaining to the subject of inquiry."

The Roberts case would be in point here, if Ballew's statement in the case at bar both had been against his own interest and had concerned the same count of the indictment which was made the subject of the redirect examination.

IV. This paragraph relates to a request to charge, which it is not necessary to consider, as defendant's point is fully set forth by his next assignment of error.

V. This is an exception to instructions of the court, and raises the vital question whether the transaction described by Mrs. Burrell constitutes a crime against the

pension laws of the United States; whether, that is, the moneys deposited by her in the Merchants' National Bank instantaneously lost their character as pension moneys, so that, although within an hour, and as part of the same general transaction, they were fraudulently obtained from her by the pension attorney, his fraudulent act can not be regarded as a withholding of pension moneys within the meaning of the law.

Describing the transaction, the learned judge says (p. 39):

> If you believe that this was all one transaction, arranged and designed by the defendant in this case for the purpose of getting into his possession $1,800 of the money which the pensioner received; that it was a scheme designed by him, one continuous transaction for that purpose, and that he was a party to it and was the beneficiary of the money received, then that would be in law a withholding of the money under this statute, and the defendant would be guilty and it would be your duty to convict him and it would be necessary for you to believe that. * * * I will state it to you again. * * * That if all these facts or series of facts are one continuous transaction, designed by the defendant and arranged by him as contended for by the Government, for the purpose of getting into his possession eighteen hundred and odd dollars of the money of the pensioner, and that he did receive it or was the beneficiary of the receipt of it, then that would be withholding in the meaning of the statute.

The test thus laid down by the court was a severe one. The jury were not to convict the prisoner unless the whole scheme was prearranged.

Were the moneys in bank pension moneys after they were redeposited? If they were pension moneys, there can be no doubt that defendant has been withholding them.

It is to be remembered that they were not mingled with any other moneys of the old woman. It is not claimed that she had any other moneys in that bank. The testimony clearly indicates the contrary. The delivery of the cash to her by the bank and its immediate redeposit were mere colorable transactions, evidently part of her attorney's scheme.

It is also to be remembered that she was still his client, in the same transaction, and that the influence which he had gained over her as pension attorney was still in full life.

Assume, however, that there is error in this instruction. What is its legal effect?

There are two counts in the indictment, for separate and distinct crimes. The jury have found the defendant guilty upon each count. Every issue of fact has been passed upon by them. Because it is held that the issues upon one count were improperly submitted to the jury, does that render nugatory the whole trial upon the other count and their verdict thereon? That would be absurd; and it is respectfully submitted that no rule of procedure or principle of justice or equity requires such a result, but that there should be an affirmance upon the second count in the indictment. (See *Claassen* v. *United States*, 142 U. S., 140; *Evans* v. *United States*, 153 U. S., 584, 588.)

Or the United States should at least, it is submitted, be allowed to elect to enter a *nolle* as to the count under which the error occurred and bring the prisoner up for resentence under the other. An error in the sentence does not vitiate the verdict (*In re Bonner*, 151 U. S., 242, 262) and the case may be remanded for resentence. (Wharton's Crim. Pl. and Pr., §§ 780, 928; Act of Feb. 6, 1889, ch. 113, § 6; cas. cit. in 21 Am. and Engl. Cycl. of Law, pp. 1082–1083.)

It is in the power of this court to adopt such a procedure as may be reasonable as well as just. It is bound by no common-law technicalities, because the common law had no rules at all for such a case. No bill of exceptions in criminal cases was there known. (Wharton's Crim. Pl. and Pr., § 772.) The jurisdiction of this court is based on a simple grant of a right to review upon writ of error "in cases of conviction of a capital or other infamous crime." (Act of Mar. 3, 1891, ch. 417, § 5.) The procedure in each of these classes of cases is presumably to be the same—that is, "under such rules and regulations as this court may prescribe." (Act of Feb. 6, 1889, ch. 113, § 6.) It is therefore submitted that if error be found to exist in instructions concerning one of two crimes tried together, the district attorney should be given the same right which plaintiff has in a civil action (*Washington and Georgetown R. R.* v. *Harmon*, 147 U. S., 571, 590)—to abandon the erroneous portion and thus save the rest.

The broad authority given to this court in criminal cases is equivalent to the powers given to many State courts in such cases to render, on appeal, such judgment

upon the verdict as the trial court should have rendered; a power construed by the supreme court of Washington to authorize a judgment of murder in the second degree upon a conviction for murder in the first degree, where the evidence proved only the lesser crime. (*In re Frederich*, 149 U. S., 70.) This construction was in accord with the authorities in other States and violated no constitutional right of the prisoner. (*Simpson* v. *State*, 56 Ark., 8, 19, and cas. cit.)

The case of *Maryland* v. *Baldwin* (112 U. S., 490, 493), relied upon by plaintiff in error in his brief, is not in point. It relates to errors affecting one only of several defenses to the same cause of action. The jury had found a general verdict for defendant. It was impossible to ascertain upon which defense the verdict was based. It was, therefore, impossible to ascertain whether or not plaintiff had been prejudiced by the error. This, of course, necessitated an unconditional reversal of the judgment. An error touching one of several pleas is totally different in character in this respect from an error touching one of several counts in a declaration or indictment. The effects of the latter are traceable; of the former, not. The Maryland case would not have been reversed had the jury found separately as to each plea. As Mr. Justice Field remarked of the general verdict rendered, "Its generality prevents us from perceiving upon which plea they found." But a general verdict of guilty upon a series of counts for different crimes (as distinguished from a series of counts intended to cover the same crime) is practically equivalent to a separate verdict upon each.

Commonwealth v. *Boston & Maine R. R.* (133 Mass., 383) is likewise clearly distinguishable, as pointed out by the court (p. 391): "It can not be doubted that the two counts under consideration are for the same offense." In *Commonwealth* v. *Andrews* (132 Mass., 263), defendant was tried on two counts, each intended to apply to the same offense. Although the trial court had erroneously refused to quash one of the counts, and although there was a general verdict of guilty, yet the Supreme Court, finding that no evidence had been admitted which was not applicable to the other count which was good, held the defendant not to have been prejudiced, and overruled his exceptions as to the latter. (See Wharton Crim. Pl. and Pr., 9th ed., § 771 and notes.)

In *Wood* v. *People* (59 N. Y., 117) the facts do not clearly appear, but the position taken by counsel for plaintiff in error was that "if there be several charges combined *in one count* and one charge is insufficient, the whole is bad."

In *Blitz* v. *United States* (153 U. S., 308, 317) plaintiff in error had been convicted of two different crimes and sentenced to two successive terms of imprisonment. The first count was held insufficient by this court; but the other having been held good, the judgment to that extent was affirmed.

It is submitted that this reasonable ruling should be extended so as to save the second count in the present case if the first is held not to have been proven.

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